No. 90-6861-CFX
Status: GRANTED

Title: John J. McCarthy, Petitioner
v.
Mr. Maddigan, et al.

Docketed:
January 18, 1991

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Smith,Paul M.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Dec 5 1990	G	Application (A90-434) to extend the time to file a petition for a writ of certiorari from December 19, 1990 to January 18, 1991, submitted to Justice White.
2	Dec 7 1990		Application (A90-434) granted by Justice White extending the time to file until January 18, 1991.
3	Jan 18 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
6	Feb 25 1991		Order extending time to file response to petition until March 27, 1991.
7	Mar 27 1991		Brief of respondents United States in opposition filed.
8	Apr 4 1991		DISTRIBUTED. April 19, 1991
9	Apr 5 1991	X	Reply brief of petitioner John McCarthy filed.
11	Apr 22 1991		Petition GRANTED.
			**********
13	Apr 25 1991		Order extending time to file brief of petitioner on the merits until June 20, 1991.
14	May 29 1991		Joint appendix filed.
15	Jul 5 1991		Brief of petitioner John J. McCarthy filed.
17	Jul 16 1991		Order extending time to file brief of respondent on the merits until August 7, 1991.
18	Aug 7 1991		Brief of respondents Mr. Maddigan, et al. in opposition filed.
19	Aug 21 1991		CIRCULATED.
20	Aug 23 1991		Record filed.
		*	USDC D KS-one vol.
21	Sep 9 1991	X	Reply brief of petitioner John McCarthy filed.
22	Oct 15 1991		SET FOR ARGUMENT MONDAY, DECEMBER 9, 1991. (1ST CASE)
23	Dec 9 1991		ARGUED.

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ORIGINAL

No. 90-6861

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether a federal prisoner who seeks only money damages for an alleged violation of his constitutional rights by prison officials must, before bringing a Bivens action in federal court, exhaust administrative remedies in the Bureau of Prisons, even though the inmate grievance procedure is inherently inadequate since it bars considerations of tort claims and does not allow for any award of monetary relief.

Parties to the Proceeding Below

Appellant:

John J. McCarthy

Appellees:

Mr. Maddigan
Dr. Perry
Dr. Walter
Dr. Delmuro

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. _____

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

John J. McCarthy petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 914 F.2d 1411, and reprinted at Pet. App. 1a. The unpublished orders of the United States District Court for the District of Kansas dismissing petitioner's action and denying his motion for reconsideration are reprinted at Pet. App. 4a & 6a, respectively.

JURISDICTION

The Tenth Circuit entered judgment on September 20, 1990. On December 7, 1990, Justice White granted petitioner's application for an enlargement of time in which to file the petition for certiorari, to and including January 18, 1991. Pet. App. 15a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution and federal regulations governing administrative remedies available to resolve the grievances of federal prisoners. The Eighth Amendment provides in full, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The relevant Bureau of Prison (BOP) regulations are published at 28 C.F.R. § 542.10 et seq. (1990), and reprinted at Pet. App. 8a-10a.

STATEMENT

This case involves a federal prisoner whose Bivens action against prison officials was dismissed for failure to exhaust administrative remedies. The court of appeals affirmed, holding that the Bureau of Prisons' administrative remedies for handling inmate grievances -- which do not allow for consideration of tort claims and make no provision for monetary awards -- must be

exhausted even by a prisoner who seeks only money damages in a suit alleging a constitutional tort.

Petitioner John J. McCarthy is currently incarcerated in the federal penitentiary at Leavenworth, Kansas. On April 3, 1990, he filed a pro se Bivens action against the prison's hospital administrator (Maddigan), chief psychologist (Perry), and two prison physicians (Walters and Delmuro), alleging that they had abridged his Eighth Amendment rights through deliberate indifference to his serious medical needs.[1] See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Petitioner claimed that in the two months following surgery on his spinal column at a prison hospital, he had suffered from persistent and severe back pain, for which he repeatedly but unsuccessfully sought effective treatment from the defendants. Pet. App. 12a-13a. The pain resulting from his condition, petitioner alleged, had caused him to "persistently stay[] up at all hours of the night" and to "lay on the floor and

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1 Petitioner, who is serving time for a Connecticut conviction and was transferred to the federal system pursuant to 18 U.S.C. § 5003, also alleged a violation of 18 U.S.C. § 4042, which requires the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042(2). Perhaps because courts have uniformly held that Section 4042(2) provides no private right of action, see, e.g., Chinchello v. Fenton, 805 F.2d 126, 134 (3d Cir. 1986); Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969); Gibson v. Matthews, 715 F. Supp. 181, 188-90 (E.D. Ky. 1989), both the district court and the court of appeals characterized petitioner's complaint as alleging only an Eighth Amendment violation and ruled on this basis. See Pet. App. 1a-2a, 4a.

pull on his legs," which in turn "cause[d] his cellmate to [be] kept up and cause[d] problems between them." Id. at 13a. Construed liberally, McCarthy's complaint further alleged that his pain was exacerbated by his inability "to cope with stress," a psychiatric condition for which he had received treatment in the past. Id. at 12a. Petitioner further alleged that his repeated requests for effective medical treatment were ignored or refused, that Dr. Walters refused to treat him, and that Chief Psychologist Perry "attempted to make a joke of the [w]hole situation and laughed." Id. at 13a. To redress these alleged constitutional violations, McCarthy sought money damages but not declaratory or injunctive relief. Id. at 11a, 12a, 14a.[2] He also requested a jury trial on his claims. Id. at 14a.[3]

In an unpublished order dated April 6, 1990, the district court dismissed McCarthy's action without prejudice on the ground that he had failed to demonstrate that he had exhausted the administrative remedies provided by the Bureau of Prisons, as required in the Tenth Circuit under Brice v. Day, 604 F.2d 664, 666-68 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980). Pet. App. 4a. The district court explained that "the

2 Petitioner requested $100,000 in compensatory, $100,000 in punitive, and $100,000 in "[a]ctual" damages, as well as costs. Pet. App. 14a.

3 Though asserting that his complaint was "exempt [from] the administrative appeals exhaustion doctrine," petitioner noted that he was "[p]resently . . . appealing" but had received no response from the warden to his letter of complaint. Pet. App. 12a & n.1; see also id. at 13a n.2.

administrative remedy process is necessary for the proper and effective handling of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Ibid. Subsequently, McCarthy moved for relief from judgment under Federal Rule of Civil Procedure 60(b), which the district court denied in an unpublished order dated April 19, 1990. Id. at 6a.

On appeal, the Tenth Circuit affirmed. Pet App. 1a. The court first addressed petitioner's argument that "the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a Bivens-type action, where a federal prisoner seeks only money damages to redress an alleged constitutional violation." Id. at 2a (citation omitted). Rejecting petitioner's attempt to distinguish Brice on the grounds that the prisoner there had sought both monetary and injunctive relief, the Tenth Circuit reasoned that Brice's requirement of exhaustion of remedies "is not keyed to the type of relief sought, but to the need for preliminary fact-finding." Ibid.; see also ibid. ("Brice made clear that 'this administrative consideration is not to resolve constitutional issues nor to consider damages,' but simply to develop a factual record to assist the district court in its review.") (citation omitted) (quoting Brice v. Day, 604 F.2d at 667).

The court of appeals next acknowledged that both the Third and Sixth Circuits had ruled that exhaustion was not required for a claim such as petitioner's involving only monetary relief, but the court explicitly declined to follow those out-of-

circuit decisions. Pet. App. 2a (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)). The court went on to criticize the Third Circuit's "assumption that the courts 'may not take it upon [them]selves to impose a judicially-created exhaustion requirement directed at federal prisoners,'" ibid. (quoting Muhammad v. Carlson, 739 F.2d at 125), reasoning that since "Bivens actions are a 'creation of the judiciary,' it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions," ibid. (citations omitted).

Though agreeing with the Sixth Circuit that "'the administrative apparatus could not award money damages,'" the court of appeals reasoned that "'administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the extent of the damages.'" Ibid. (quoting Goar v. Civiletti, 688 F.2d at 29) (emphasis in original). To further support its ruling, the court of appeals invoked the Fifth Circuit's decision in Hessbrook v. Lennon, 777 F.2d 999 (1985), stating that it had "correctly construed our holding in Brice and declined to adopt the Third and Sixth Circuits' view on this issue." Pet. App. 2a. Finally, the court of appeals explained that "preliminary fact-finding is necessary in this case, as it was in Brice, to determine whether [McCarthy] has a possible Bivens cause of action." Id. at 2a-3a.

REASONS FOR GRANTING THE WRIT

This case presents an important and recurring question of federal law on which the courts of appeals are sharply divided: whether a federal prisoner seeking only money damages in a properly pleaded Bivens action must first exhaust the administrative grievance procedure provided in regulations of the Bureau of Prisons.[4] Because the lower federal courts have been unable to provide a consistent answer to this question, which arises frequently in many federal districts, review in this Court would appear to be warranted. The argument for review becomes compelling when one examines the merits of the decision below. The Tenth Circuit, in requiring exhaustion in this case of administrative remedies that plainly cannot provide the only relief sought -- damages for past constitutional violations -- has ignored the well-established rule that inadequate remedies

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4 Most courts have required federal prisoners seeking injunctive relief under 28 U.S.C. § 1331 -- alone or in combination with monetary relief under Bivens -- to exhaust the BOP's administrative grievance procedure. Those courts have relied on the theory that prospective relief could be obtained through administrative channels. See, e.g., Veteto v. Miller, 794 F.2d 98, 99-100 (3d Cir. 1986); Pyles v. Carlson, 698 F.2d 1131, 1132 (11th Cir. 1983); Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980); Simmat v. Smith, 602 F. Supp. 18, 20 (S.D.N.Y. 1984), aff'd without opinion, 779 F.2d 38 (2d Cir. 1985). But see Abdul-Khabir v. Lichtenberger, 518 F. Supp. 673, 674-75 (E.D. Va. 1981) (mixed claim need not be exhausted). Several courts, in non-prisoner cases, have declared that exhaustion of remedies is inappropriate in a Bivens action. See Sullivan v. Murphy, 478 F.2d 938, 963 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973); Mundy v. Weinberger, 554 F. Supp. 811, 819 (D.D.C. 1982); Panzarella v. Boyle, 406 F. Supp. 787, 794 (D.R.I. 1975).

need not be exhausted. Its reasoning, moreover, is fundamentally inconsistent in several important respects with the very nature of a Bivens action and creates anomalous distinctions between the remedies available to state and federal prisoners alleging identical constitutional violations.[5]

1. As the Tenth Circuit acknowledged, its ruling flatly conflicts with decisions in the Third and Sixth Circuits at the same time that it is consistent with the prevailing rule in the Fifth Circuit. Compare Muhammad v. Carlson, 739 F.2d 122, 125 (3d Cir. 1984) (no exhaustion required) and Goar v. Civiletti, 688 F.2d 27, 29 (6th Cir. 1982) (same) with Hessbrook v. Lennon, 777 F.2d 999, 1003-05 (5th Cir. 1985) (exhaustion required).[6] In other circuits, where the issue has not been definitively resolved, there are conflicts as well. Thus, district courts in the Second, Fourth, and Seventh Circuits have refused to require exhaustion in a context like this one. See Thomas v. United

5 This Court has never addressed the propriety of imposing an exhaustion requirement on persons bringing a cause of action that is conferred directly by the Constitution. Of course, where a federal right has been created by Congress and its vindication made contingent upon resort to an administrative procedure, the exhaustion-of-remedies requirement is founded upon valid separation-of-powers concerns. Similarly, where state administrative or other remedies could obviate the need for federal judicial relief, the exhaustion requirement is based on legitimate federalism concerns. Arguably, these concerns are simply absent in the Bivens context.

6 Numerous decisions in the Third and Sixth Circuits have followed Muhammad and Goar. See, e.g., McKinney v. Bureau of Prisons, 1990 U.S. App. LEXIS 20412 (6th Cir. Nov. 19, 1990); Lyons v. United States Marshals, 840 F.2d 202, 204 (3d Cir. 1988); see also Jihaad v. Carlson, 410 F. Supp. 1132, 1135 (E.D. Mich. 1976).

States Parole Comm'r, 1988 U.S. Dist. LEXIS 6914 (S.D.N.Y. July 12, 1988); Abdul-Khabir v. Lichtenberger, 518 F. Supp. 673, 675 (E.D. Va. 1981) (following the unpublished ruling in Bey v. United States, 660 F.2d 488 (4th Cir. 1981) (per curiam)); Williams v. Jenkins, 1990 U.S. Dist. LEXIS 11110, at *4-5 (N.D. Ill. Aug. 20, 1990); Byrd El v. Hafer, 1990 U.S. Dist. LEXIS 1227 (N.D. Ill. Jan. 31, 1990); Patmore v. Carlson, 392 F. Supp. 737 (E.D. Ill. 1975); cf. Bony v. Brandenburg, 735 F. Supp. 913, 914 (S.D. Ind. 1990) (declining to dismiss for failure to exhaust) ("[T]his Court is hesitant to rule that exhaustion of administrative remedies is a requirement in [a] Bivens case when the Seventh Circuit has not yet said that it is, and where there is an apparent split in the circuits on the issue."). By contrast, a district court in Oregon recently predicted that the Ninth Circuit would impose an exhaustion requirement and accordingly dismissed the case before it for failure to exhaust. Housley v. Killinger, 747 F. Supp. 1405, 1407 (D. Or. 1990). See also Cooney v. Edwards, 1990 U.S. Dist. LEXIS 16626 (D. Or. Dec. 6, 1990) (same); Frost v. Cadena, 1990 U.S. Dist. LEXIS 7720 (N.D. Cal. May 8, 1990) (exhaustion required in prisoner Bivens action where damages and TRO sought).

As these cases illustrate, the issue of exhaustion in prisoners' Bivens actions arises very frequently, but the federal courts have decided that issue in widely divergent ways. This

Court should therefore resolve this issue by granting review here.[7]

2. On the merits, the Tenth Circuit's ruling here makes little sense. To begin with, exhaustion of the Bureau of Prisons' grievance procedures prior to filing a damages case is a purely futile gesture, because those procedures cannot provide the relief sought. The procedures, codified at 28 C.F.R. §§ 542.10-.16 (1990), allow a federal prisoner to "seek formal review of a complaint which relates to any aspect of his imprisonment," Pet. App. 8a (28 C.F.R. § 542.10), but exclude "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates," id. at 9a (28 C.F.R. § 542.12). It would thus appear that petitioner's claim of constitutionally tortious conduct by prison medical personnel is categorically excluded from being heard under the regulations. Goar v. Civiletti, 688 F.2d at 29. Moreover, even if the BOP's administrative scheme would have entertained petitioner's claim, it could not have provided the remedy he sought. Petitioner sought only damages. Pet. App. 11a, 12a, 14a. The regulations simply do not authorize

7 There also appears to be a conflict, within the case law requiring exhaustion, over which BOP administrative remedies must be exhausted by a prisoner such as petitioner. Although the decision below suggests that a prisoner must only exhaust the BOP's inmate grievance procedure codified at 28 C.F.R. § 542.10 et seq., see Pet. App. 2a, the Fifth Circuit's Hessbrook decision requires exhaustion in addition of the administrative procedures for handling claims brought under the Federal Tort Claims Act. See infra p. 15 n.11.

a remedy of damages or other monetary relief to a grievant -- as every court to have examined this administrative grievance procedure has concluded. See, e.g., Muhammad v. Carlson, 739 F.2d at 125; Goar v. Civiletti, 688 F.2d at 29; Abdul-Khabir v. Lichtenberger, 518 F. Supp. at 675.

It is of course hornbook law that a party need not exhaust administrative remedies that are wholly inadequate. See, e.g., Coit Independence Joint Venture v. Federal Sav. & Loan Ins. Corp., 109 S. Ct. 1361, 1375 (1989); Honig v. Doe, 484 U.S. 305, 326-27 (1988); McNeese v. Board of Educ. for Community Unit School Dist. 187, 373 U.S. 668, 670-72 (1963). And this rule is fully applicable where a party seeks monetary relief and the relevant procedures cannot provide it. See, e.g., Wileman Bros. & Elliott, Inc. v. Giannini, 909 F.2d 332, 338 (9th Cir. 1990); Muhammad v. Carlson, 739 F.2d at 124-25; Goar v. Civiletti, 688 F.2d at 28-29. While it may make some sense to require exhaustion of administrative remedies where "the nature of [the] problem [is] an ongoing one that can be addressed in an administrative review proceeding" and which the inmate seeks to correct prospectively, Byrd El v. Hafer, 1990 U.S. Dist. LEXIS 1227, at *3, that rationale does not hold up where the only remedy sought is damages. Indeed, the United States has previously come close to conceding this point.[8]

8 The government's Brief in Opposition in Brice v. Day, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980), did not contest the underlying argument that exhaustion of remedies should not be required of a prisoner's claim for money damages under Bivens. Instead, it argued that Brice's complaint -- which alleged an Eighth Amendment violation where a prison was only 10% above capacity, and failed to allege either that Brice's own cell or area was overcrowded or that any of the high-ranking

Several additional factors weigh against requiring petitioner to exhaust the Bureau of Prisons' grievance procedures. First, a Bivens action involves the assertion of a right rooted in the Constitution. Needless to say, prison officials have no special expertise in deciding constitutional issues and, accordingly, there is no reason to defer to or await their judgment on claims like petitioner's. See Califano v. Sanders, 430 U.S. 99, 109 (1977); Plano v. Baker, 504 F.2d 595, 599 (2d Cir. 1974). Nor is this a case, in light of the skeletal investigative procedures in place in the BOP, where exhaustion should be required "in deference to the superior factfinding ability of the relevant administrative agency." Patsy v. Board of Regents, 457 U.S. 496, 506 (1982) (citing McKart v. United States, 395 U.S. 185, 192-96 (1969)). Indeed, since the grievance process starts with the warden, an exhaustion requirement would require a prisoner, in many cases, to submit his claim to the very person he holds responsible for depriving him of his constitutional rights. Cf. Felder v. Casey, 487 U.S. 131, 148-49 (1988) (Wisconsin notice-of-claim statute, in § 1983

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defendants were aware of the challenged conditions -- was properly dismissed for failure to state a claim upon which relief could be granted. No. 79-5739 Br. for the United States in Opp. at 4-6. In fact, in regard to petitioner's claim for "damages for past acts," the Solicitor General wrote: "There thus appears to be little justification for compelling [Brice] to resort to an administrative remedy that is neither designed to adjudicate constitutional damages claims nor empowered to award damages relief." Id. at 4 n.3.

action, "forces [the] injured persons to seek satisfaction from those alleged to have caused the injury in the first place").

Not only are the grievance procedures inherently worthless in a pure damages case, but they also impose significant burdens and risks on those with potentially meritorious Bivens claims. First, they are time-consuming, involving three separate levels of review. After unsuccessfully seeking "informal resolution" of his claim, a prisoner may file a "formal written complaint" with the warden and, if an unsatisfactory response is received, may appeal first to the Regional Director and then to the General Counsel. Pet. App. 9a-10a (28 C.F.R. §§ 542.13(a), 542.13(b), 542.14, 542.15). At each level, moreover, there are very short filing deadlines -- like the requirement of an initial filing within 15 days -- neglect of which might cause a prisoner to forfeit his constitutional claim.[9] See Lewis v. Meyer, 815 F.2d 43, 45 (7th Cir. 1987). At the same time, the amount of time required to pursue all levels of the process might lead to dismissal of a later court action

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9 See Pet. App. 9a (28 C.F.R. § 542.13(b)). These deadlines may be extended where a prisoner "demonstrates a valid reason for delay," such as the prison's failure to provide him with certain requested materials to which he is entitled. Id. at 9a-10a (28 C.F.R. §§ 542.13(b), 542.15, 542.16). Absent such a valid reason, prisoners have twenty days to appeal the warden's decision and thirty days to appeal the Regional Director's decision. Id. at 9a (28 C.F.R. § 542.15).

for failure to satisfy the statute of limitations.[10] See Patsy v. Board of Regents, 457 U.S. at 514 n.17 ("Unless the doctrine that statutes of limitations are not tolled pending exhaustion were overruled, a judicially imposed exhaustion requirement might result in the effective repeal of § 1983.") (citation omitted).

In addition, contrary to the view of the Tenth Circuit, the Bureau's grievance procedure is unlikely to produce a paper record that will aid the district court in evaluating a Bivens claim. First, the regulations do not even require the preparation of a written report containing factual findings. In fact, nothing in the regulations precludes the warden or subsequent prison officials from simply denying a prisoner's claim without explanation. Second, the regulations do not provide for any hearing mechanism nor do they confer on prisoners any of the panoply of rights that would ensure full development of a factual record upon which a court could reasonably rely, including a right to appear before the investigator, call witnesses, be represented by counsel, or retain one's own investigator. Plano v. Baker, 504 F.2d at 598-99. Instead, the regulations create an ex parte, informal investigative procedure that may even, as noted above, be administered by the very person

10 The warden must respond within 15 days to the all but emergency complaints, and the Regional Director and General Counsel each have 30 days to decide appeals. Pet. App. 9a (28 C.F.R. §§ 542.14, 542.15). These time periods may be doubled, however, if they are "insufficient to make an appropriate decision." Ibid. (28 C.F.R. § 542.14).

whom the prisoner is suing. In light of the institutional loyalties of those who administer it, this administrative scheme is "hardly . . . conducive to a truly adjudicatory performance," and credibility judgments made by its participants are entitled to no deference by the district court. Cf. Cleavinger v. Saxner, 474 U.S. 193, 204 (1985). For a federal court to rely wholly on such a record in determining, for example, whether a Bivens claim has any merit, would be an abdication of judicial duty.[11]

11 The Bureau of Prisons' separate administrative procedure for handling prisoner claims brought under the Federal Tort Claims Act (FTCA), see 28 C.F.R. §§ 543.30-543.32 (1990), has no relevance to this case -- as the court of appeals itself appeared to acknowledge. Pet. App. 2a (conceding that relevant BOP administrative apparatus "'could not award money damages'") (quoting Goar v. Civiletti, 688 F.2d at 29); see also Muhammad v. Carlson, 739 F.2d 122, 125 (3d Cir. 1984); Mundy v. Weinberger, 554 F. Supp. 811, 819 (D.D.C. 1982); Patmore v. Carlson, 392 F. Supp. 737, 739 (E.D. Ill. 1975). But see Hessbrook v. Lennon, 777 F.2d 999, 1003-05 (5th Cir. 1985). First, that distinct procedure covers only "administrative claims asserted under the Federal Tort Claims Act . . . ." Id. § 543.30. Second, the FTCA itself provides a remedy against the United States that is separate and distinct from the constitutional Bivens remedy against an official in her personal capacity. Carlson v. Green, 446 U.S. 14, 18-23 (1980). Indeed, Congress recently confirmed the irrelevance of the FTCA and its administrative exhaustion requirement to Bivens claims. See Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. 100-694, 102 Stat. 4564 (codified at 28 U.S.C. § 2679(b)(2)(B)); see also H.R. Rep. No. 700, 100th Cong., 2d Sess., reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 5945, 5949-50. Moreover, even if a court should sometimes consider whether a prisoner seeking money damages in a Bivens action has also exhausted the Bureau's FTCA claims procedures, that requirement would have no application where, as here, even those additional administrative remedies cannot provide an adequate remedy. Compare Carlson v. Green, 446 U.S. at 21-22 (punitive damages available under Bivens but not FTCA) and 28 C.F.R. § 543.31(f) (1990) (imposing $2500 cap on FTCA damages recoverable) with supra note 2 (petitioner sought $300,000 in damages, including punitive damages). Lastly, it is worth noting that requiring Bivens claimants seeking damages to exhaust FTCA administrative procedures would have the ironic effect of encouraging every prisoner with a Bivens claim to add an FTCA claim to his case.

3. It would be particularly ironic to ignore these practical factors and require exhaustion in a Bivens context since, under Bivens, the existence of an adequate statutory remedy would preclude the implied action for damages altogether. Having authorized Bivens suits in precisely this type of case, see Carlson v. Green, 446 U.S. 14, 18-19 (1980), it would make little sense for this Court also to require exhaustion of an inadequate grievance procedure. To be sure, Congress could do away with Bivens actions for federal prisoners by enacting a comprehensive, or expressly exclusive, remedial scheme in the Bureau of Prisons for handling prisoners' constitutional tort claims. "Were Congress to enact some statutory scheme authorizing the Federal Bureau of Prisons or its equivalent to provide an effective alternative remedy for prisoners asserting constitutional violations," explained Judge Adams in Muhammad v. Carlson, "the implied remedies that Bivens recognized indeed might be unnecessary." 739 F.2d at 124-25. That has not, however, happened. Until it does, federal prisoners retain a Bivens action whose very existence presupposes inadequate administrative remedies. Exhaustion of such remedies should not be required.

Congress could also expressly condition Bivens actions on exhaustion of administrative remedies. But it has not done that either. To the contrary, the best indication of congressional intent in this area is the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e. That provision overrules

the usual principle that exhaustion is not required in Section 1983 cases. Patsy v. Board of Regents, 457 U.S. at 500-12. It does so, however, only where a state prison system sets up a grievance process that meets certain specific standards. To qualify, a state system must offer "plain, speedy, and effective administrative remedies," 42 U.S.C. § 1997e(a)(1), as well as meet five statutory minimum standards, including provision for: (1) an advisory role for inmates and prison employees "in the formulation, implementation, and operation of the system"; (2) "specific maximum time limits for written replies to grievances with reasons thereto at each decision level"; (3) priority processing of emergency grievances; (4) safeguards to avoid reprisals against grievants or other participants in the system; and (5) independent review of the disposition of grievances "by a person or other entity not under the direct supervision or direct control of the institution." 42 U.S.C. § 1997e(b)(2).

The statute further directs the Attorney General to develop a procedure for promptly certifying state systems, and to promulgate regulations and standards governing both the certification process and the criteria for approval. 42 U.S.C. §§ 1997e(b)(1), 1997e(c)(1). Those regulations, currently codified at 28 C.F.R. §§ 40.1 et seq. (1990), impose additional requirements on state administrative systems. See, e.g., 28 C.F.R. § 40.6 (requiring grievance procedure to "afford a successful grievant a meaningful remedy" and stating that "[a]lthough available remedies may vary among institutions, a

reasonable range of meaningful remedies in each institution is necessary"); id. § 40.7(c) (barring inmates or employees who are implicated in subject of grievance from participating "in any capacity in the resolution of the grievance"); id. § 40.7(d) (requiring "[r]easoned, written responses" to grievances).

The Bureau of Prison's inmate grievance procedure falls well short of the CRIPA standards. The federal procedure, by failing to entertain tort claims or to provide any chance of monetary relief, lacks an effective or meaningful remedy for claimants such as petitioner. Neither does the federal system require a reasoned response to grievances, or protection from reprisals for participants in the grievance proceeding, and so on. Thus, under the decision below, a federal prisoner is required to exhaust a remedy that his state counterpart would not have to pursue before seeking to vindicate the very same constitutional rights in federal court.

As this Court recognized in Butz v. Economou, 438 U.S. 478 (1978), in rejecting broader immunity for federal officials than for state officials, "federal officials should enjoy no greater zone of protection when they violate federal constitutional rules than do state officers." Id. at 501 (emphasis in original). Indeed, "[t]o create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." Id. at 504. Imposing on Bivens claimants a burdensome and futile exhaustion requirement,

along with its attendant delay, represents a significant burden on the vindication of constitutional rights by federal prisoners not shouldered by their counterparts in the state systems. Such a rule serves no valid interest and, as the CRIPA statute demonstrates, is more likely to frustrate than to vindicate the will of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

lan, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1948). However, the application of this doctrine in the case before us does not lead to the construction sought by appellant.

The Ninth Circuit in *Jew Ten v. I.N.S.*, 307 F.2d 832 (1962), considered the same argument as here advanced by the appellant including the impact of the 1956 exclusion of drug offenses. The court there reached the same conclusion as herein expressed—the recommendation provision is applicable only to offenses described in § 1251(a)(4) and no other deportable offenses. *See also Oviawe v. I.N.S.*, 853 F.2d 1428 (7th Cir.1988); *Delgado-Chavez v. I.N.S.*, 765 F.2d 868 (9th Cir.1985).

In *United States v. Gonzales*, 582 F.2d 1162 (7th Cir.1978), the court upheld the trial court's refusal to consider a recommendation where the offense was not within § 1251(a)(4). There the offense was drug related and thus, of course, expressly excluded, but the issue as to whether the recommendation need be considered at all by the trial judge would there be the same as in the case before us as to non-included offenses.

We have quoted above the words of the trial judge at sentencing on this issue, and again, we construe it as a statement that the suggestion that a recommendation be made did not need to be considered on its merits.

AFFIRMED.

John J. McCARTHY, Plaintiff-Appellant,

v.

Mr. MADDIGAN, Dr. Perry; Dr. Walter, Dr. Delmuro, Defendants-Appellees.

No. 90-3112.

United States Court of Appeals, Tenth Circuit.

Sept. 20, 1990.

Inmate brought civil rights action against prison officials, alleging deliberate indifference to a serious medical need. The United States District Court for the District of Kansas, Richard Dean Rogers, J., dismissed claim without prejudice, and subsequently denied inmate's motion for relief from judgment. Inmate appealed. The Court of Appeals, Brorby, Circuit Judge, held that exhaustion of administrative remedies was required in *Bivens*-type action in which prisoner sought only money damages to address alleged violation of Eighth Amendment.

Affirmed.

Administrative Law and Procedure ⇐230
United States ⇐50.20

Exhaustion of administrative remedies was required in *Bivens*-type action in which federal prisoner sought only money damages to redress alleged violation of his Eighth Amendment rights due to prison officials' alleged deliberate indifference to his serious medical needs. 28 U.S.C.A. § 1331; U.S.C.A. Const.Amend. 8.

John J. McCarthy, pro se.

Before McKAY, MOORE, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a)(1); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant John J. McCarthy appeals the district court's dismissal of his civil rights claim filed pursuant to 28 U.S.C. § 1331 and the court's denial of his motion for relief from judgment made pursuant to Fed.R.Civ.P. 60(b). Appellant alleges that the deliberate indifference to his serious medical needs of officials of the federal

penitentiary in Leavenworth, Kansas, violates his Eighth Amendment rights, and he seeks damages. The district court dismissed the claim without prejudice because Mr. McCarthy failed to demonstrate he had made use of the administrative review process provided by the Bureau of Prisons, as required by *Brice v. Day*, 604 F.2d 664, 666–68 (10th Cir.1979), *cert. denied*, 444 U.S. 1086, 100 S.Ct. 1045, 62 L.Ed.2d 772 (1980). District Court Order of April 6, 1990. For the reasons cited in its first order, and because appellant failed to present any new evidence, the district court also denied appellant's motion for relief from judgment. District Court Order of April 19, 1990.

Appellant argues that the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a *Bivens*-type action, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where a federal prisoner seeks only money damages to redress an alleged constitutional violation. He urges us to follow certain cases from the Third and Sixth Circuits rejecting such a requirement.

The appellants in *Brice v. Day* argued, as does Mr. McCarthy, that the exhaustion of administrative remedies requirement does not apply where damages are sought for a violation of a constitutional right. 604 F.2d at 665. One of the appellants in *Brice* sought monetary damages and "what other relief the court deems fair." *Id.* This court held that "preliminary fact-finding would be necessary to determine whether there is a possible *Bivens* cause of action.... Thus, if we assume that the petitions before us could indicate a *Bivens* cause of action as the appellants argue, we must ... require an initial administrative inquiry." *Id.* at 666. *Brice* made clear that "this administrative consideration is not to resolve constitutional issues nor to consider damages," *id.* at 667, but simply to develop a factual record to assist the district court in its review.

Appellant relies principally on *Muhammad v. Carlson*, 739 F.2d 122 (3d Cir.1984), and *Goar v. Civiletti*, 688 F.2d 27 (6th Cir.1982), both of which hold that a federal prisoner seeking only money damages in a *Bivens*-type action need not first exhaust administrative remedies. *Muhammad* and *Goar*, however, do not state the law in this circuit. Moreover, these cases mischaracterize this circuit's holding in *Brice*. According to the Third Circuit, *Brice* held that a "federal prisoner seeking damages and other relief for overcrowded conditions must exhaust administrative remedies." 739 F.2d at 125 n. 1; *cf.* 688 F.2d at 29. The rule of *Brice*, however, is not keyed to the type of relief sought, but to the need for preliminary fact-finding. *Brice* does not except cases involving claims for monetary damages only.

We also disagree with the Third Circuit's assumption that the courts "may not take it upon ourselves to impose a judicially-created exhaustion requirement directed at federal prisoners." 739 at 125. Given that *Bivens* actions are "a creation of the judiciary," *id.* at 124; *accord Brice*, 604 F.2d at 665, it follows that the courts may, and indeed must, establish reasonable requirements for bringing such actions. Furthermore, as the Sixth Circuit recognized in *Goar*, "[a]lthough the administrative apparatus could not award money damages .... administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." 688 F.2d at 29 (emphasis in original).

We further note that in *Hessbrook v. Lennon*, 777 F.2d 999, 1007 n. 14 (1985), the Fifth Circuit correctly construed our holding in *Brice* and declined to adopt the Third and Sixth Circuits' view on this issue. We agree with the *Hessbrook* panel that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their ... treatment during confinement." 777 F.2d at 1007.

We find no merit in the other cases cited by appellant, Appellant's Opening Brief at 3, nor do they alter our conclusion that preliminary fact-finding is necessary in this case, as it was in *Brice*, to determine

whether appellant has a p
cause of action. *See* 604 F
Hatcher v. Office of Compt
rency, 631 F.2d 985, 989 n. 6
(citing *Brice*). Furthermore
pellant alleged in his complai
invoked the prison grievance
or to filing this suit, he does
on appeal the district court'
he "failed to demonstrate h
[available] administrative rem
Order of April 6, 1990, at 1.

Accordingly, we grant perm
ceed in forma pauperis, and
the district court is AFFIRM

UNITED STATES of A
Plaintiff–Appellee

v.

William Troy BULLOCK a/
Allen Tate, Defendant–Ap

No. 89–7066.

United States Court of A
Tenth Circuit.

Sept. 20, 1990.

Defendant was convicted in
States District Court for the E
trict of Oklahoma, Frank H
Chief Judge, of, inter alia, use o
commission of various drug
crimes. On appeal, the Court
Seth, Circuit Judge, held that:
ment was sufficient, and (2) ev
sufficient to support conviction

Affirmed.

1. Indictment and Information

Though failure of indictme
offense is fatal defect that ma
at any time, countervailing inter
cial efficiency requires that ta

whether appellant has a possible *Bivens* cause of action. *See* 604 F.2d at 666; *cf. Hatcher v. Office of Comptroller of Currency*, 631 F.2d 985, 989 n. 6 (D.C.Cir.1980) (citing *Brice*). Furthermore, although appellant alleged in his complaint that he had invoked the prison grievance procedure prior to filing this suit, he does not challenge on appeal the district court's finding that he "failed to demonstrate his use of the [available] administrative remedy process." Order of April 6, 1990, at 1.

Accordingly, we grant permission to proceed in forma pauperis, and the order of the district court is AFFIRMED.

UNITED STATES of America,
Plaintiff–Appellee,

v.

William Troy BULLOCK a/k/a Larry Allen Tate, Defendant–Appellant.

No. 89–7066.

United States Court of Appeals,
Tenth Circuit.

Sept. 20, 1990.

Defendant was convicted in the United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, of, inter alia, use of firearm in commission of various drug trafficking crimes. On appeal, the Court of Appeals, Seth, Circuit Judge, held that: (1) indictment was sufficient, and (2) evidence was sufficient to support conviction.

Affirmed.

1. Indictment and Information ⇐117

Though failure of indictment to state offense is fatal defect that may be raised at any time, countervailing interest in judicial efficiency requires that tardily challenged indictments be construed liberally in favor of validity.

2. Weapons ⇐17(1)

Indictment charging defendants with using or carrying firearms "in the commission of the drug trafficking crimes listed" and with assembling collection of weapons to protect and defend drug laboratory, was sufficiently specific and descriptive even though indictment did not quote precise statutory language that use of firearms was during "and in relation to" drug trafficking crimes. 18 U.S.C.A. § 924(c).

3. Indictment and Information ⇐110(2)

Indictment need not quote statutory language to be legally sufficient.

4. Weapons ⇐4

Amendment to statute proscribing use or carrying of firearm during commission of drug trafficking crime, requiring showing that firearm was used "during and in relation to" crime, did not create new element to offense which had to be specifically alleged; instead, amendment refined factor already in statute with no change in meaning of "used" element. 18 U.S.C.A. § 924(c).

5. Weapons ⇐4

Defendant could be convicted for "use" of firearm in commission of drug trafficking crime, though he did not have firearm on his person at time he was arrested; there were guns in virtually every room of defendant's house, with loaded shotgun on bed within a few feet of defendant, and codefendant testified that guns would be used if necessary to protect their drug operation from being "ripped-off." 18 U.S.C.A. § 924(c).

Sheldon J. Sperling, Asst. U.S. Atty. (John Raley, U.S. Atty., with him on the brief), Muskogee, Oklahoma, for plaintiff-appellee.

Gene V. Primomo of Wilcoxen & Wilcoxen, Muskogee, Okl., for defendant-appellant.

U.S. DISTRICT COURT
DISTRICT OF KANSAS

IN THE UNITED STATES DISTRICT COURT APR 6 10 45 AM '90
FOR THE DISTRICT OF KANSAS

BY _____ DEPUTY

JOHN J. McCARTHY,

Plaintiff,

v.

MR. MADDIGAN, et al.,

Defendants.

CASE NO. 90-3101-R

O R D E R

This matter is before the court on a civil rights complaint filed pursuant to 28 U.S.C. § 1331. Plaintiff, a Connecticut prisoner housed at the United States Penitentiary, Leavenworth, Kansas, (USPL), alleges that defendants have demonstrated deliberate indifference to his medical needs in violation of the Eighth Amendment. Plaintiff seeks damages.

The court finds that plaintiff has failed to demonstrate his use of the administrative remedy process provided by the Bureau of Prisons. Use of the administrative remedy process is a prerequisite to federal judicial review. See Lane v. Hansberry, 593 F.2d 648 (5th Cir. 1979); Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980); Rivera v. Toft, 477 F.2d 535 (10th Cir. 1973). Further, the administrative remedy process is necessary for the proper and effective handing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance. Brice, 604 F.2d at 667.

IT IS THEREFORE ORDERED that this action is hereby dismissed without prejudice. The clerk of the court is directed to transmit a copy of this order to plaintiff.

DATED: This 6th day of April, 1990 at Topeka, Kansas.

/s/ DALE E. SAFFELS
RICHARD D. ROGERS
United States District Judge

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

APR 19 1 59 PM '90

RALPH L. DELOACH,
BY B. [illegible] DEPUTY
AT TOPEKA, KS.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN J. McCARTHY,

Plaintiff,

v.

MR. MADDIGAN, et al.,

Defendants.

CASE NO. 90-3101-R

O R D E R

This matter is before the court on plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. Pro. 60(b) and plaintiff's Notice of Appeal, filed simultaneously with this court.

Plaintiff was permitted to proceed in this action in forma pauperis. The action was dismissed without prejudice by this court's Order dated April 6, 1990. Plaintiff has filed a Notice of Appeal from the order of dismissal, and, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, might appeal in forma pauperis without further authorization in the absence of a certificate prescribed by the second paragraph of that rule.

The court first finds the motion for relief from judgment should be denied. The court dismissed this action without prejudice due to plaintiff's failure to exhaust available administrative remedies. Plaintiff had provided no new evidence, and the arguments made by plaintiff do not persuade the court that its prior ruling should be disturbed.

AO 72A
(Rev. 8/82)

RDR:RL

For the reasons set forth in the Order of April 6, 1990, and because plaintiff makes no allegations on appeal, the court further finds that the appeal is legally frivolous and is not taken in good faith.

IT IS THEREFORE ORDERED that plaintiff's motion for relief from judgment be denied.

IT IS FURTHER ORDERED that plaintiff is hereby denied leave to proceed in forma pauperis on appeal. The clerk of the court is directed to transmit a copy of this order to plaintiff and

DATED: This 19th day of April, 1990, at Topeka, Kansas.

/s/ RICHARD D. ROGERS
RICHARD D. ROGERS
United States District Judge

AO 72A
(Rev. 8/82)

housing and the likely health threat the inmate poses to others by his actions.

(b) The Warden shall serve as the review authority at the institutional level, and shall make a recommendation to the Regional Director when he believes the inmate should be considered for release from controlled housing.

(c) An inmate may appeal a Warden's decision not to recommend release from controlled housing to the Regional Director within five working days of receipt of that decision.

(d) Upon recommendation of the Warden, or upon appeal from the inmate, the Regional Director may decide whether or not to release the inmate to general population from controlled housing status.

(e) An inmate may appeal a decision of the Regional Director, through the Administrative Remedy Procedure, directly to the Program Review Division, Bureau of Prisons within 30 calendar days from the date of the Regional Director's decision.

[54 FR 11323, Mar. 17, 1989; 54 FR 18198, Apr. 27, 1989]

§ 541.68 Release from controlled housing status.

(a) Only the Regional Director may release an inmate from controlled housing status. The following factors are considered in the evaluation of an inmate's readiness for return to the general population:

(1) Relationship with other inmates and staff members, which demonstrate that the inmate is able to function in a less restrictive environment without posing a health threat to others or to the orderly operation of the institution;

(2) Involvement in work and recreational activities and assignments or other programs; and

(3) Adherence to institution guidelines and Bureau of Prisons rules and policy.

(b) An inmate released from a controlled housing status may be returned to the general population of that institution, or to another federal or non-federal institution.

PART 542—ADMINISTRATIVE REMEDY

Subpart A—[Reserved]

Subpart B—Administrative Remedy Procedure for Inmates

Sec.
542.10 Purpose and scope.
542.11 Responsibility.
542.12 Issues improperly filed.
542.13 Initial filing.
542.14 Remedy processing.
542.15 Appeals.
542.16 Index and access.

AUTHORITY: 18 U.S.C. 4001, 4042, 4081, 4082, 5015, 5039; 28 U.S.C. 509; 28 CFR 0.95-0.99.

SOURCE: 44 FR 62250, Oct. 29, 1979, unless otherwise noted.

Subpart A—[Reserved]

Subpart B—Administrative Remedy Procedure for Inmates

§ 542.10 Purpose and scope.

The Bureau of Prisons has established an Administrative Remedy Procedure through which an inmate may seek formal review of a complaint which relates to any aspect of his imprisonment if less formal procedures have not resolved the matter. This procedure applies to all inmates confined in Bureau of Prisons institutions, but does not apply to inmates confined in non-federal facilities.

§ 542.11 Responsibility.

(a) The Warden, Regional Director, and General Counsel are responsible for the operation of the Administrative Remedy Procedure at the institution, regional and central office levels, respectively, and shall:

(1) Establish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate;

(2) Acknowledge receipt of a complaint or appeal by returning to the inmate a signed receipt;

(3) Conduct an investigation into each complaint or appeal;

(4) Respond to and sign all complaints or appeals filed at their level.

This responsibility may not be delegated further.

(b) Inmates have the responsibility to present complaints in good faith and in an honest and straightforward manner.

§ 542.12 Issues improperly filed.

Filings will not be accepted under the Administrative Remedy Procedure for tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates.

§ 542.13 Initial filing.

(a) *Informal resolution.* Inmates shall informally present their complaints to staff, and staff shall attempt to informally resolve any issue before an inmate files a request for Administrative Remedy. The Warden may establish local procedures to ensure that attempts at informal resolution are made.

(b) *Filing.* If an inmate is unable to informally resolve his complaint, he may file a formal written complaint, on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred. Where the inmate demonstrates a valid reason for delay, an extension in filing time shall be allowed. An extension in the time for filing shall be allowed when an inmate indicates and staff verify that a response to the inmate's request for copies of dispositions requested under section 8 of this Program Statement (§ 542.16) has not been received. An inmate may obtain assistance in preparation of his complaint or appeal from other inmates or from institution staff.

(c) *Sensitive complaints.* If the inmate believes the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution, he may file the complaint directly with the Regional Director. The inmate must explain, in writing, the reason for not filing the complaint at the institution. If the Regional Director agrees that the complaint is sensitive, he shall accept and respond to the complaint. If the Regional Director does not agree that the complaint is sensitive, he shall advise the inmate in writing of that determination, without a return of the complaint. The inmate may pursue the matter by filing the complaint locally with the Warden.

(d) *Control Unit Appeals.* Appeals relative to Control Unit placement may be filed directly with the General Counsel.

[44 FR 62250, Oct. 29, 1979, as amended at 44 FR 76726, Dec. 27, 1979]

§ 542.14 Remedy processing.

Response time limits. A complaint or appeal is considered filed when the receipt is issued. Once filed, response shall be made by the Warden within fifteen (15) calendar days, by the Regional Director within thirty (30) calendar days, and by the General Counsel within thirty (30) calendar days. If the complaint is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond within 48 hours of receipt of the complaint. If the period of time for response to a complaint or appeal is insufficient to make an appropriate decision, the time for response may be extended once by the same amount of time as originally allowed for response. Staff shall inform the inmate of this extension in writing. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level. Staff shall, however, respond to all filed complaints.

§ 542.15 Appeals.

Filing. If an inmate is not satisfied with the Warden's response, that response may be appealed on the appropriate form to the Regional Director within twenty (20) calendar days of the date of the Warden's response. If the inmate is not satisfied with the Regional Director's response, that response may be appealed on the appropriate form to the General Counsel within thirty (30) calendar days from the date of the Regional Director's response. Where a valid reason for delay is stated by an inmate these time limits may be extended. Appeal to the Office of General Counsel is the final

administrative appeal in t
Prisons.

§ 542.16 Index and access.

Disposition access.) members of the public access to Administrative dexes and to responses b at the location where tained. Copies, with nar identifiers deleted, may during regular office ho purchased.

PART 543—LEGAL

Subpart A—[Rese

Subpart B—Inmate Leg

Sec.
543.10 Purpose and scope
543.11 Legal research and legal documents.
543.12 Retention of attorn
543.13 Visits by attorneys
543.14 Limitation or de visits and correspondei
543.15 Legal aid program
543.16 Other paralegals, assistants.

Subpart C—Claims Under Claims A

543.30 Purpose and scope.
543.31 Procedures.
543.32 Appreciation and

Subpart A—[Re

Subpart B—Inmate L

AUTHORITY: 5 U.S.C. 30 4042, 4081, 4082, 5015, 5 510; 28 CFR 0.95-0.99.

SOURCE: 44 FR 38263, J otherwise noted.

§ 543.10 Purpose and sco

The Bureau of Pri inmate reasonable acce terials and counsel, and portunity to prepare le The Warden shall es al law library, and proce to legal reference ma legal counsel, and for legal documents.

[46 FR 59509, Dec. 4, 1981]

administrative appeal in the Bureau of Prisons.

§ 542.16 Index and access.

Disposition access. Inmates and members of the public may request access to Administrative Remedy indexes and to responses by case number at the location where they are retained. Copies, with names and other identifiers deleted, may be inspected during regular office hours or may be purchased.

PART 543—LEGAL MATTERS

Subpart A—[Reserved]

Subpart B—Inmate Legal Activities

Sec.
543.10 Purpose and scope.
543.11 Legal research and preparation of legal documents.
543.12 Retention of attorneys.
543.13 Visits by attorneys.
543.14 Limitation or denial of attorney visits and correspondence.
543.15 Legal aid program.
543.16 Other paralegals, clerks, and legal assistants.

Subpart C—Claims Under the Federal Tort Claims Act

543.30 Purpose and scope.
543.31 Procedures.
543.32 Appreciation and depreciation.

Subpart A—[Reserved]

Subpart B—Inmate Legal Activities

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 4001, 4042, 4081, 4082, 5015, 5039; 28 U.S.C. 509, 510; 28 CFR 0.95-0.99.

SOURCE: 44 FR 38263, June 29, 1979, unless otherwise noted.

§ 543.10 Purpose and scope.

The Bureau of Prisons affords an inmate reasonable access to legal materials and counsel, and reasonable opportunity to prepare legal documents. The Warden shall establish an inmate law library, and procedures for access to legal reference materials and to legal counsel, and for preparation of legal documents.

[46 FR 59509, Dec. 4, 1981]

§ 543.11 Legal research and preparation of legal documents.

(a) The Warden shall make materials in the inmate law library available whenever practical, including evening and weekend hours. The Warden shall allow an inmate a reasonable amount of time, ordinarily during the inmate's leisure time, to do legal research and to prepare legal documents. Where practical, the Warden shall allow preparation of documents in living quarters during an inmate's leisure time.

(b) The Warden shall periodically ensure that materials in each inmate law library are kept intact and that lost or damaged materials are replaced.

(c) Staff shall advise an inmate of rules and local procedures governing use of the inmate law library. Unauthorized possession of library materials by an inmate constitutes a prohibited act, generally warranting disciplinary action (see Part 541 of this chapter).

(d) An inmate may receive or purchase law materials from outside the institution, but the Warden may reject material if there is a compelling reason in the interest of institution security, good order, or discipline. The Warden may limit for housekeeping reasons the amount of legal materials an inmate may accumulate. An inmate may receive hardcover law books from publishers or bookstores. An inmate may receive softcover material (for example, paperback books, newspapers, magazines) from any source. An inmate may receive court or legal documents from court clerks or judges or from his attorney through the mail or incident to visiting. Staff may inspect these documents for contraband but may not read them if properly presented.

(e) An inmate is responsible for submitting his documents to court. Institution staff who are authorized to administer oaths shall be available to provide necessary witnessing of these documents, as requested by inmates and at times scheduled by staff.

(f) Unless the institution has an active, ongoing legal aid program, the Warden shall allow an inmate the assistance of another inmate during

John J. McCarthy /38051-066 pro se
State No; 14163
United States Penitentiary
P.O. BOX 1000
Leavenworth, Kansas., 66048-1000

[Filed April 3, 1990]

UNITED STATES DISTRICT COURT

DISTRICT OF KANSAS

JOHN J. MCCARTHY /38051-066 State No; 14163 [PLAINTIFF]	:	CIVIL NO: JUDGE:
V.	:	CIVIL RIGHTS COMPLAINT 28 U.S.C. 1331
Hospital Administrator Maddigan Chief Psychologist Dr Perry Dr Walters Dr Delmuro United States Penitentiary Leavenworth, Kansas.,66048-1000 [D. FENDANT'S]	:	"WITH A JURY DEMAND" This Complaint seeks Home; Damages Only.

COMPLAINT

1. JURISDICTION;

1. 28 U. S. C. 1331
2. 18 U. S. C. 4042
3. 18 U. S. C. 5003

2. PARTIES;

a. Plaintiff;

John J. McCarthy /38051-066 (state No; 14163) is a State of Connecticut prisoner held in Federal Custody pursuant to 18 U. S. C. 5003., and Conn. Gen. Statute 18-71. He is above the age of eighteen years and

a tax payer, he is serving sentences for non-violent crimes of Larceny in the first degree cited as State v. McCarthy, 197 CONN 247 (1985)., State v. McCarthy, 197 CONN 166 (1985).

b. Defendant's;

Maddigan/Perry/Walters/Delmuro are all staff at the United States Penitentiary Leavenworth and work under color of United States Law pursuant to Statutes/Regulations/Contracts and Agreements. They are above the age of eighteen years and tax payers. Each are sued in bosth capacities-officially as well as individually.

3. THIS COMPLAINT IS EXEMPT TO THE ADMINISTRATIVE APPEALS EXHAUSTION DOCTRINE

This Complaint seeks "Money Damage Awards Only" therefor is exempt to the administrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq)1/

4. FACTS;

1. The plaintiff is a State prisoner held in Federal Custodypursuant to 18 U.S.C. 5003., Conn. Gen. Statute 18-91 and a "written contract agreement" pursuant to 18 U.S.C. 5003 (a). The Federal Bureau of prisons has a Statutory duty to provide "medical" treetment to the plaintiff pursuant to 18 U.S.C. 5003 (c) and 4042 (2) Id.

2. The Plaintiff has a long history for serious medical needs. A few months ago he experienced a opperation on his spinal collum at the United States Medical Center at Springfield Missouri. The opperation was unsuccessfull and the plaintiff is in pain most of the time. The Plaintiff also has a history for psychatric care and on several occasuions while held in other Federal Penitentiaries was treated with medications because he is unable to cope with stress.

Note; 1/ Presently the Plaintiff is appealing.

3. For several months the Plaintiff on occasion cpmplained to medical staff about his Back pain and requested medication. The only medication that was ever proscribed was insignificant and at times the Plaintiff was forced to purchase contraband drugs. Also the Plaintiff complained to medical staff that because of his back injury and pain problems he is persistently staying up at all hours of the night, he has to lay on the floor and pull on his legs this causes his cellmate to kept up and causes problems between them. The Plaintiff requested a singel cell and staff persistently egnored him.

4. On March 28/1990 the Plaintiff appealed personally to Dr Delmuro for pain medication/a singel cell/stress medication. Dr Delmuro flagerently egnored the plaintiff and told him that if he was not satisifed to see the hospital administrator Defendant Maddigan. The plaintiff then went and saw Defendant Maddigan and explained his situation to him. Defendant Maddigan claimed that he was not a doctor and therefor could not treat the plaintiff and that if he did not like his response to complain to the Warden. 2/

The Plaintiff then went and saw Chief psycholigest Defendant Perry and explained to his that for over a month now he was having these problems and that he had previously seene Defendant Dr Walters complaining of these problems and other problems and that Dr Walters was not going to request a medication untill after the plaintiff seen Dr Delmuro or other hospital staff. The plaintiff informed Dr Perry that he had seen hospital staff and they refused to treat him and that this and related problems were causing stress and violent reactions.

The Plaintiff then went and saw Dr Walters and appealed to him again and Dr Walters claimed that he would not treat the plaintiff.

The Plaintiff then returned and saw Dr Perry explaining the above and Dr Perry attempted to make a joke of the hole situation and laughed.

Note; 2/ The Plaintiff has written the Warden who fails to respond

5. CONCLUSION AND CONSTITUTIONAL VIOLATIONS;

1. The action outlined in FACTS violates the United States Constitution eighth amendment and is in fact deliberate indefference to serious medical needs.

2. The action outlined Id., violates 18 U.S.C. 5003 the "written contract agreement" and 18 U.S.C. 4042 (2) as well as 28 C.F.R. Regulations 0.95 and 0.96.

3. The action of the Defendant's denying to the plaintiff medication for pain and stress causes pain and suffering and violates the Eighth Amendment of the United States Constitution.

6. RELIEF;

Plaintiff seeks "Money Damage Awards Only" in the following amounts and manner;

1. $100.000.00# Compensatory

2. $100.000.00# Punitive

3. $100.000.00# Actual

4. All Costs for this litigation to be taxed to the Defendant's.

5. All damage awards to apply seperately and appear to each and every defendant appart.

6. A Jury Trial on all issues.

7. VARIFICATION;

I swear and state under penalty of purjury and the law that the forgoing is true and correct; Executed on day month, 1990 By The Plaintiff;

John J. McCarthy #38051-066 (state No; 14163)

I swear and state the forgoing to be true and correct ; Executed; day month 1990 By The Plaintiff;

John J. McCarthy #38051-066 (state no; 14163)

Supreme Court of the United States

No. A-434

John J. McCarthy,

Petitioner

v.

Mr. Maddigan, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 18, 1991.

/s/Byron R. White
Associate Justice of the Supreme Court of the United States

Dated this 7th day of December, 1990.

ORIGINAL

No. 90-6861

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. McCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal prisoner seeking money damages must exhaust the administrative remedies provided by the Bureau of Prisons before filing a federal court action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 914 F.2d 1411. The orders of the district court (Pet. App. 4a-5a and 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. On December 7, 1990, Justice White extended the time in which to file a petition for a writ of certiorari until January 18, 1991, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a prisoner at the federal penitentiary in Leavenworth, Kansas, filed a pro se complaint in the United States District Court for the District of Kansas pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Claiming that the medical staff at Leavenworth would not give him the particular drugs he demanded for pain and stress, petitioner sought $300,000 in actual, compensatory, and punitive damages.

Petitioner's complaint alleged that a few months after undergoing back surgery he was experiencing pain "most of the time." Pet. App. 12a. The medical staff at Leavenworth had provided him with medication to treat the pain, petitioner said, but this medication was "insignificant." Id. at 13a. Petitioner alleged that the medical staff refused to provide him with the drugs of his choice and that, as a consequence, "at times" petitioner "was forced to purchase contraband drugs." Ibid. Petitioner also claimed that he had a "long history" of serious medical needs and of psychiatric care and that he had received medication in the past "because he is unable to cope with stress." Id. at 12a. Petitioner alleged that the medical staff at Leavenworth exhibited "deliberate indifference" to his "serious medical needs" by failing to prescribe the medication he requested, in violation of his Eighth Amendment rights. Id. at 14a.

The district court dismissed petitioner's complaint without prejudice because he had failed to exhaust his administrative

remedies as required by Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).[1] Pet. App. 4a-5a. In support of its ruling, the district court stated that the "administrative remedy process is necessary for the proper and effective hand[l]ing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Id. at 4a.

The court of appeals affirmed. Pet. App. 1a-3a. The court held that its decision in Brice v. Day required a federal prisoner to exhaust administrative remedies before bringing a Bivens action, no matter what type of relief was sought. "Brice made clear," the court stated (id. at 2a), that "'administrative consideration is not to resolve constitutional issues nor to consider damages' * * * but simply to develop a factual record to assist the district court in its review." The court of appeals recognized (ibid.) the decisions of the Third Circuit in Muhammad v. Carlson, 739 F.2d 122 (1984), and of the Sixth Circuit in Goar v. Civiletti, 688 F.2d 27 (1982), holding that the federal prisoner plaintiffs in those cases were not required to exhaust their administrative remedies before bringing Bivens claims limited to money damages, but it declined to alter its own exhaustion rule. The court noted its agreement with the Fifth Circuit, which had concluded that "'a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement.'" Pet. App.

[1] The administrative remedy in question is that set forth by the Bureau of Prisons in 28 C.F.R. 542.10-542.16.

2a, quoting Hessbrook v. Lennon, 777 F.2d 999, 1007 (5th Cir. 1985). The court of appeals reasoned that because Bivens actions are a "'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." Pet. App. 2a.[2]

ARGUMENT

Petitioner contends that because he is seeking money damages only, the court of appeals erred by requiring him to exhaust administrative remedies. In addition, he maintains that the court of appeals' decision conflicts with decisions of the Third and Sixth Circuits and that this Court should resolve that conflict. We disagree. In our view, the court of appeals correctly decided to require petitioner to exhaust his administrative remedies. And while we recognize the existence of disagreement among the circuits, we believe that review by this Court is not warranted at this time.

1. The court of appeals properly held that federal prisoners must exhaust their administrative remedies before pursuing a Bivens action. Ordinarily, a party is required to exhaust administrative remedies before seeking relief in the federal courts. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The exhaustion requirement does not preclude judicial relief, but

[2] We have been informed by the Bureau of Prisons that, while his appeal was pending, petitioner filed a number of grievances complaining about the medical treatment he was receiving. His most recent grievance was denied by the warden on March 6, 1991. Petitioner appealed the warden's decision to the Regional Director of the Bureau of Prisons on March 9, 1991.

simply postpones the timing of a judicial determination, Muhammad v. Carlson, 739 F.2d at 124, while establishing a record of the positions of the parties. "[A]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193 (1969).

"In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress." Patsy v. Florida Board of Regents, 457 U.S. 496, 502 n.4 (1982). Congress has authorized the Bureau of Prisons to manage and regulate all federal correctional institutions, to provide for prison discipline, and to review, investigate, and respond to prisoner complaints. See 18 U.S.C. 4001 and 4042. Plainly, the Bureau of Prisons, and not the federal judiciary, has primary responsibility for federal prisoners. While the courts must, of course, ensure that the Bureau conducts its affairs in accordance with the requirements of the Constitution, the courts should also be careful not to undermine prison discipline by providing "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the court room." Brice v. Day, 604 F.2d at 667.

In 42 U.S.C. 1997e, Congress sought to foster a system of state administrative remedies for adult prisoners -- a system that those prisoners would be required to exhaust before bringing actions

against state officials under 42 U.S.C. 1983. Congress's purpose in enacting Section 1997e was to encourage the resolution of prison problems by prison administrators, to reduce a backlog of prisoner Section 1983 cases that was "swamping" the federal district courts, to resolve some cases, and to help frame the issues in the remaining cases in order to make them ready for expeditious court consideration. S. Rep. No. 96-416, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Admin. News, 787, 816. Congress has also imposed an exhaustion requirement on federal prisoners who seek damages under the Federal Torts Claim Act (FTCA). See 28 U.S.C. 2672, 2675.

Bivens actions are a "creation of the judiciary." Pet. App. 2a. "A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task." Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring). Since this Court has "fashion[ed] for itself a legislative role" by recognizing prisoner Bivens actions (id. at 35 (Rehnquist, J., dissenting)), the federal courts should follow through by establishing rules to govern and channel those actions. Just as Congress has fostered exhaustion requirements for state prisoners bringing Section 1983 actions and imposed such requirements for federal prisoners bringing FTCA actions, the federal courts should require federal prisoners bringing Bivens actions to exhaust the relevant administrative remedies.

As the court below recognized in its earlier decision in Brice v. Day, requiring a prisoner to exhaust administrative remedies

before bringing a Bivens action provides many benefits associated with prior administrative consideration, such as filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute.[3] In addition, an exhaustion rule applied to Bivens actions helps reduce the intrusion of the courts into prison administration, promotes judicial efficiency, encourages the resolution of problems by prison administrators, and prevents the circumvention of established procedures.[4]

This case illustrates the benefits of an exhaustion rule. Requiring a prisoner who complains about his medical treatment to exhaust his administrative remedies by filing a complaint with the Bureau of Prisons would be likely to create a record providing

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[3] Petitioner states (Pet. 14) that it is not clear from the regulations that prison officials prepare a written response to prisoner grievances. However, Federal Prison System Program Statement 1330.7 at p.3 (1979) makes clear that "[r]esponses shall be in writing." That requirement is reflected in the regulations, which provide that inmates and members of the public must have access to the responses and to an index describing the grievances. 28 C.F.R. 542.12.

[4] Petitioner notes (Pet. 10) that the regulations do not provide for the consideration of "tort claims," see 28 C.F.R. 542.12, and suggests that his claim "is categorically excluded from being heard under the regulations." But the regulations provide for the consideration of "a complaint which relates to any aspect of [the complainant's] imprisonment if less formal procedures have not resolved the matter." 28 C.F.R. 542.10. Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated by prison medical personnel and would be able to provide various forms of relief -- including the provision of alternative medical treatment -- even though they are not authorized to award money damages in such cases. In fact, as noted above, petitioner has filed a number of grievances complaining about his medical treatment since the district court dismissed his Bivens action, and the warden has responded to each complaint.

background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints. Furthermore, the filing of such a complaint with the Bureau of Prisons would not only assist the district court if a Bivens suit is ultimately brought, it might serve to conciliate or resolve the underlying issues and thus render a Bivens action unnecessary. Thus, the court of appeals acted reasonably in upholding a requirement of exhaustion.

In this case, the district court dismissed petitioner's Bivens action without prejudice for failure to exhaust administrative remedies. Other courts agree that dismissal without prejudice is warranted in cases like this. Davis v. Keohane, 835 F.2d 1147, 1149 (6th Cir. 1987); Veteto v. Miller, 794 F.2d 98, 100 (3d Cir. 1986). Therefore, petitioner will be able to refile his Bivens action, if he desires, as soon as his most recent grievance is decided. At that time, he will have exhausted his administrative remedies, and the district court will have the benefit of the record that has been compiled.

2. The disagreement in the circuits does not, in our view, warrant this Court's attention. As an initial matter, the courts of appeals agree that exhaustion must be required in some circumstances before a prisoner may bring a Bivens action. Thus, like the court below, the Third Circuit requires the exhaustion of administrative remedies when a federal prisoner seeks injunctive relief as well as money damages. Veteto v. Miller; Waddell v.

Alldredge, 480 F.2d 1078 (1973). Similarly, in Davis v. Keohane, 835 F.2d at 1149, the Sixth Circuit required exhaustion because the prisoner had not "clearly shown that exhaustion would be * * * unable to afford him the relief he requests."

Those two circuits, however, have allowed federal prisoners to proceed directly to court in certain circumstances. In Muhammad v. Carlson, the Third Circuit held that "[b]ecause a prisoner asserting only a claim for damages under Bivens apparently can obtain no relief from the Bureau of Prisons, it would serve little purpose to require him to exhaust administrative remedies before coming into the courts." 739 F.2d at 125. The court distinguished cases such as Brice v. Day, where "the prisoner is seeking more than money damages." Id. at 125 n.1. Similarly, in Goar v. Civiletti the Sixth Circuit excused a federal prisoner from exhausting administrative remedies where the prisoner sought damages only and "the alleged tortious acts were not continuing." 688 F.2d at 29. The court distinguished Brice v. Day by stating that prison administrators might have been able to cure the overcrowded conditions forming the basis of the complaint in that case, but could not remedy the damage from the assault forming the basis of the claim in Goar. Ibid.[5]

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[5] The Seventh Circuit has considered whether exhaustion of administrative remedies should be required in Bivens cases, but has not adopted a position on the issue. In Greene v. Meese, 875 F.2d 639, 643 (1989), the court suggested that "[w]hether complete exhaustion of Bureau of Prison remedies should be required even in cases where the prisoner is also seeking damages, a remedy not found in the Bureau's arsenal, may depend on what the damages are being sought for." The court added that, in certain cases, "[u]nless exhaustion is required prisoners will have an incentive to bypass the administrative procedures * * * by suing for damages and raising the identical issues in such suits that they would have raised in a complaint to the Bureau of Prisons if they had filed one." Ibid.

Thus, for certain Bivens actions the Third and Sixth Circuits permit district court consideration without requiring a prisoner to exhaust his administrative remedies. However, it appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice.[6] In the present case, although plaintiff seeks only damages (perhaps in an effort to avoid any exhaustion requirement[7]), it appears from his complaint (Pet. App. 11a-14a) that he suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff. That is confirmed by the grievances that petitioner has filed in the last year complaining about his medical treatment. See note 2, supra. Therefore, any Eighth Amendment violation arising out of this situation appears likely to continue absent a change in the ongoing medical treatment afforded to this

---

[6] No continuing prison practice was at issue in Goar, where the prisoner complained that he had been injured by an assault by another inmate. 688 F.2d at 28. In Muhammad, the prisoner made two unrelated claims. One of the claims -- based on the prisoner's placement in administrative detention for seven days -- clearly had no ongoing significance. 739 F.2d at 123. The other claim was based on the denial of medical treatment for a back injury; there was no indication in the court's opinion whether the problem was ongoing. Ibid.

[7] Petitioner alleged that "[t]his Complaint seeks 'Money Damage Awards Only' therefor is exempt to the adminstrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq.)." Pet. App. 12a. He added, in a footnote to the complaint, "Presently the Plaintiff is appealing." Ibid. Thus, it seems clear that petitioner intended to split off his damage claim and pursue it in court while simultaneously seeking other relief for the same problem through administrative channels.

prisoner by the prison medical staff. It is thus not clear on these facts whether any court of appeals would forgive petitioner's failure to exhaust administrative remedies.

In any event, it may be that a uniform rule with respect to exhaustion is not required. One court recently noted that the federal courts are being "flooded by prisoner litigation." Del Raine v. Carlson, 826 F.2d 698, 702 (7th Cir. 1987). Circuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion of the Bureau of Prison's administrative remedies. Other circuits may fairly conclude that it is more efficient to handle Bivens actions with the benefit of preliminary fact-finding by the Bureau of Prisons. It is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. MCCARTHY PETITIONER	)	
V	)	NO. 90-6861
MR. MADDIGAN, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE RESPONDENTS IN OPPOSITION by mail on March 27, 1991.

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March 27, 1991

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-6861

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Respondents, in their brief, acknowledge the clear conflict among the circuits over whether a federal prisoner must exhaust administrative remedies before bringing a Bivens action seeking only damages. In light of that acknowledgement, their arguments against review, like their efforts to defend the Tenth Circuit's ruling on the merits, are unavailing.

1. While recognizing the basic conflict cited by petitioner,[1] respondents nevertheless oppose review for three reasons. First, they observe that the courts of appeals do not disagree about an issue that is not presented in this case -- i.e., whether a federal prisoner who seeks both injunctive relief and damages must exhaust administrative remedies. Br. in Opp. 8-9. Whatever the validity of that observation, see Pet. 7 n.4, it simply has no bearing on whether the Court should grant the petition in this case.

Second, respondents suggest that conflicting decisions in the Third and Sixth Circuits are distinguishable because in those cases the prisoners were not complaining about "continuing prison practice[s]." See Br. in Opp. 10-11 & n.6 (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)); see also id. at 10 ("[I]t appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice."). In drawing this purported distinction, however, respondents have had to rewrite the decisions they try to reconcile with the ruling below. As the Tenth Circuit in this case recognized, Goar, Muhammad, and the many cases following them, see Pet. 8 n.6, focus solely on the type of relief sought by the prisoner. See Pet. App. 2a (Goar and Muhammed "hold that a federal prisoner seeking only

1 Notably, respondents do not even address the clear subsidiary conflict between the ruling below and the Fifth Circuit's Hessbrook decision over which administrative remedies must be exhausted by federal prisoners prior to bringing a Bivens action. See Pet. 10 n.7. However, they do apparently reject the Hessbrook rule -- previously supported by the Solicitor General -- that a federal prisoner bringing a Bivens action must exhaust the separate FTCA administative procedures. Compare Br. in Opp. 3 n.1 ("The administrative remedy in question is that set forth . . . in 28 C.F.R. 542.10-542.16."), with Br. for the United States in Opp., Prows v. Black (No. 88-6970), at 6-7.

money damages in a Bivens-type action need not first exhaust administrative remedies"). There is no basis for thinking that the Third and Sixth Circuits would require exhaustion in a pure damages case if the problem underlying the complaint appeared to be continuing or recurrent.

In any event, respondents' effort to treat this case as turning on a "continuing prison practice," Br. in Opp. 10-11, is unavailing -- first, because nothing in the decision below relies on such a characterization; and second, because the characterization is wrong. Relying on materials that are neither in the record nor properly the subject of judicial notice (since they are "subject to reasonable dispute," Fed. R. Evid. 201(b)), respondents assert that petitioner has filed a number of independent administrative grievances involving unspecified "medical treatment he was receiving." Br. in Opp. 4 n.2. Even if true, however, this assertion does not change the fact that in this case, petitioner complained only about one specific problem with medical care and sought only damages as relief.[2] Moreover, respondents neglect to note that, last month, petitioner was transferred out of the penitentiary at Leavenworth to another federal facility. That development extinguishes any possibility

---

2 To the extent that respondents' "continuing conditions" argument attempts to extend petitioner's claim backward in time, it also rests on a misreading of petitioner's complaint. Compare Br. in Opp. 10 (contending that petitioner, in his complaint, alleges that he "suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff") with Pet. App. 12a-13a (the actual complaint, which focused on denial of adequate medical care over a period of several months following a recent back operation).

that the prison grievance procedure could now address any issue of "ongoing" care at Leavenworth raised implicitly by petitioner's lawsuit.

As a third and final argument against review, respondents suggest that "a uniform rule with respect to exhaustion is not required." Id. at 11. Explaining that "[c]ircuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion," respondents conclude that "[i]t is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures." Ibid.

This argument is meritless. To begin with, respondents fail to provide any references to case law, or even any statistics, supporting the idea that the circuits have divided on the basis of their relative resources or case loads. More importantly, it makes no sense to advocate a rule requiring exhaustion of the Bureau of Prisons' (BOP) grievance procedure in some jurisdictions but not in others. That procedure, after all, is set forth in a nationally applicable regulation and provides in all cases for a final appeal to the same official -- the Bureau's General Counsel. See Pet. App. 9a-10a (28 C.F.R. § 542.15). If a prisoner is seeking only damages, exhaustion will be equally beneficial, or futile, regardless of his prison's particular location. Finally, tolerance of continued intercircuit disarray on this issue will create enormous uncertainties for prisoners in circuits that have not yet spoken. In seeking to vindicate their constitutional rights, they will be

forced to guess about which rule will ultimately be applied to them.

2. On the merits of the exhaustion issue, respondents concede that the BOP's administrative grievance procedure does not allow for an award of damages, the only type of relief sought by petitioner. See Br. in Opp. 7 n.4. They nonetheless maintain that the decision below is correct because exhaustion of BOP remedies may achieve certain salutary effects, including "filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute." Id. at 7.

Without delving much further into the merits at this stage, we would simply note that respondents' arguments in this regard are deeply flawed. To begin with, as we noted in our petition, see Pet. 10, the BOP grievance procedure flatly excludes consideration of inmate "tort claims." Pet. App. 9a (28 C.F.R. § 542.12). Respondents seek to avoid this problem by pointing to an earlier general section in the regulations allowing an inmate to "seek formal review of a complaint which relates to any aspect of his imprisonment." Pet. App. 8a (28 C.F.R. § 542.10); see Br. in Opp. 7 n.4. But even respondents do not appear to contend that this general section authorizes consideration of a complaint that is a pure tort claim -- i.e., one that seeks only monetary compensation for past conduct.[3]

3 See Br. in Opp. 7 n.4 ("Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated . . . .") (emphasis added).

Thus, respondents' argument that petitioner's grievance would have been entertained in the administrative process depends on their own unsupported characterization of the grievance as one seeking to forestall ongoing mistreatment.

Even if the BOP would entertain petitioner's tort claim, respondents are simply incorrect in predicting that exhaustion would "provide[] many benefits associated with prior administrative consideration." Br. in Opp. 7. First, as we noted in our petition, respondents vastly overstate the value of any paper "record" likely to be compiled through the BOP grievance procedure. Pet. 14-15. Nor is it an answer to point out, as respondents do, that an internal BOP policy statement requires prison officials to respond "in writing" to grievances. Br. in Opp. 7 n.3. Presumably that requirement would be satisfied by sending the grievant a letter stating simply, "Your grievance is denied."[4]

Second, even if the BOP grievance procedure were to produce "a record providing background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints," id. at 7-8, it would be an abdication of

4 Respondents' related suggestion that the grievance procedure will provide useful "discovery" should be rejected out of hand. Br. in Opp. 7-8; see also Pet. App. 4a. Given the absence of formal mechanisms capable of creating a useful record, it is unlikely that the BOP's procedure will in fact yield any detailed new information. More fundamentally, respondents have cited no authority suggesting that it is appropriate to adopt an exhaustion requirement for the purpose of expanding the discovery provisions of the Federal Rules of Civil Procedure.

judicial duty for a court to rely on such a record in deciding, for example, to dismiss a prisoner's complaint as frivolous under 28 U.S.C. § 1915(d). Third, respondents are wrong in suggesting that the BOP's administrative remedies might "serve to conciliate or resolve" petitioner's claims. Br. in Opp. 8. Since petitioner's complaint sought only damages, and respondents concede that the grievance procedure does not allow for the award of monetary relief, id. at 7 n.4, there is no way that the grievance procedure could have "resolved" anything.[5]

As these factors make clear, it simply makes no sense to require a prisoner who seeks only damages to exhaust the BOP administrative process. Such a requirement entails not only delay in the vindiction of constitutional rights but the real possibility of forfeiture of a valid claim. See Pet. 13-14. And it serves no valid purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

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5 Respondents suggest that Congress would favor exhaustion here, citing the statutory provisions governing exhaustion in section 1983 actions by state prisoners. See Br. in Opp. 5-6. But as we explained in our petition, Congress has authorized states to avoid the nonexhaustion rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), only where the state enacts an administrative grievance procedure that offers to state prisoners, among other things, "plain, speedy, and effective administrative remedies." 42 U.S.C. § 1997e(a)(1) (emphasis added). See Pet. 16-18. Because the BOP's administrative remedies would fail that test -- a point not disputed by respondents -- requiring federal prisoners to exhaust those remedies would run afoul of the available congressional intent on the issue presented by this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of the Reply Brief for Petitioner in McCarthy v. Maddigan, No. 90-6861, was served by first-class mail, postage prepaid, this 4th day of April, 1991, on the following:

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April 4, 1991

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Mr. William Gullickson
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United States Supreme Court
Washington, D.C. 20543

RE: McCarthy v. Maddigan, et al., No. 90-6861

Dear Mr. Gullickson:

In accordance with our telephone conversation earlier today, I have enclosed for filing, pursuant to Supreme Court Rules 15.6 and 39, an original and 10 copies of the Reply Brief for Petitioner in support of the petition for a writ of certiorari in the above-captioned case. A certificate of service is also enclosed.

Sincerely,

Alan E. Untereiner

AEU:jc
Enclosures

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JOHN J. McCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal prisoner seeking money damages must exhaust the administrative remedies provided by the Bureau of Prisons before filing a federal court action pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is reported at 914 F.2d 1411. The orders of the district court (Pet. App. 4a-5a and 6a-7a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. On December 7, 1990, Justice White extended the time in which to file a petition for a writ of certiorari until January 18, 1991, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a prisoner at the federal penitentiary in Leavenworth, Kansas, filed a pro se complaint in the United States District Court for the District of Kansas pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Claiming that the medical staff at Leavenworth would not give him the particular drugs he demanded for pain and stress, petitioner sought $300,000 in actual, compensatory, and punitive damages.

Petitioner's complaint alleged that a few months after undergoing back surgery he was experiencing pain "most of the time." Pet. App. 12a. The medical staff at Leavenworth had provided him with medication to treat the pain, petitioner said, but this medication was "insignificant." Id. at 13a. Petitioner alleged that the medical staff refused to provide him with the drugs of his choice and that, as a consequence, "at times" petitioner "was forced to purchase contraband drugs." Ibid. Petitioner also claimed that he had a "long history" of serious medical needs and of psychiatric care and that he had received medication in the past "because he is unable to cope with stress." Id. at 12a. Petitioner alleged that the medical staff at Leavenworth exhibited "deliberate indifference" to his "serious medical needs" by failing to prescribe the medication he requested, in violation of his Eighth Amendment rights. Id. at 14a.

The district court dismissed petitioner's complaint without prejudice because he had failed to exhaust his administrative

remedies as required by Brice v. Day, 609 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980).[1] Pet. App. 4a-5a. In support of its ruling, the district court stated that the "administrative remedy process is necessary for the proper and effective hand[l]ing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." Id. at 4a.

The court of appeals affirmed. Pet. App. 1a-3a. The court held that its decision in Brice v. Day required a federal prisoner to exhaust administrative remedies before bringing a Bivens action, no matter what type of relief was sought. "Brice made clear," the court stated (id. at 2a), that "'administrative consideration is not to resolve constitutional issues nor to consider damages' * * * but simply to develop a factual record to assist the district court in its review." The court of appeals recognized (ibid.) the decisions of the Third Circuit in Muhammad v. Carlson, 739 F.2d 122 (1984), and of the Sixth Circuit in Goar v. Civiletti, 688 F.2d 27 (1982), holding that the federal prisoner plaintiffs in those cases were not required to exhaust their administrative remedies before bringing Bivens claims limited to money damages, but it declined to alter its own exhaustion rule. The court noted its agreement with the Fifth Circuit, which had concluded that "'a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement.'" Pet. App.

---

[1] The administrative remedy in question is that set forth by the Bureau of Prisons in 28 C.F.R. 542.10-542.16.

2a, quoting Hessbrook v. Lennon, 777 F.2d 999, 1007 (5th Cir. 1985). The court of appeals reasoned that because Bivens actions are a "'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." Pet. App. 2a.[2]

ARGUMENT

Petitioner contends that because he is seeking money damages only, the court of appeals erred by requiring him to exhaust administrative remedies. In addition, he maintains that the court of appeals' decision conflicts with decisions of the Third and Sixth Circuits and that this Court should resolve that conflict. We disagree. In our view, the court of appeals correctly decided to require petitioner to exhaust his administrative remedies. And while we recognize the existence of disagreement among the circuits, we believe that review by this Court is not warranted at this time.

1. The court of appeals properly held that federal prisoners must exhaust their administrative remedies before pursuing a Bivens action. Ordinarily, a party is required to exhaust administrative remedies before seeking relief in the federal courts. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). The exhaustion requirement does not preclude judicial relief, but

[2] We have been informed by the Bureau of Prisons that, while his appeal was pending, petitioner filed a number of grievances complaining about the medical treatment he was receiving. His most recent grievance was denied by the warden on March 6, 1991. Petitioner appealed the warden's decision to the Regional Director of the Bureau of Prisons on March 9, 1991.

simply postpones the timing of a judicial determination, Muhammad v. Carlson, 739 F.2d at 124, while establishing a record of the positions of the parties. "[A]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." McKart v. United States, 395 U.S. 185, 193 (1969).

"In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress." Patsy v. Florida Board of Regents, 457 U.S. 496, 502 n.4 (1982). Congress has authorized the Bureau of Prisons to manage and regulate all federal correctional institutions, to provide for prison discipline, and to review, investigate, and respond to prisoner complaints. See 18 U.S.C. 4001 and 4042. Plainly, the Bureau of Prisons, and not the federal judiciary, has primary responsibility for federal prisoners. While the courts must, of course, ensure that the Bureau conducts its affairs in accordance with the requirements of the Constitution, the courts should also be careful not to undermine prison discipline by providing "tickets to an immediate confrontation with the guards and supervisors outside the prison and in the court room." Brice v. Day, 604 F.2d at 667.

In 42 U.S.C. 1997e, Congress sought to foster a system of state administrative remedies for adult prisoners -- a system that those prisoners would be required to exhaust before bringing actions

against state officials under 42 U.S.C. 1983. Congress's purpose in enacting Section 1997e was to encourage the resolution of prison problems by prison administrators, to reduce a backlog of prisoner Section 1983 cases that was "swamping" the federal district courts, to resolve some cases, and to help frame the issues in the remaining cases in order to make them ready for expeditious court consideration. S. Rep. No. 96-416, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Admin. News, 787, 816. Congress has also imposed an exhaustion requirement on federal prisoners who seek damages under the Federal Torts Claim Act (FTCA). See 28 U.S.C. 2672, 2675.

Bivens actions are a "creation of the judiciary." Pet. App. 2a. "A plaintiff who seeks his remedy directly under the Constitution asks the federal courts to perform an essentially legislative task." Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring). Since this Court has "fashion[ed] for itself a legislative role" by recognizing prisoner Bivens actions (id. at 35 (Rehnquist, J., dissenting)), the federal courts should follow through by establishing rules to govern and channel those actions. Just as Congress has fostered exhaustion requirements for state prisoners bringing Section 1983 actions and imposed such requirements for federal prisoners bringing FTCA actions, the federal courts should require federal prisoners bringing Bivens actions to exhaust the relevant administrative remedies.

As the court below recognized in its earlier decision in Brice v. Day, requiring a prisoner to exhaust administrative remedies

before bringing a Bivens action provides many benefits associated with prior administrative consideration, such as filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute.[3] In addition, an exhaustion rule applied to Bivens actions helps reduce the intrusion of the courts into prison administration, promotes judicial efficiency, encourages the resolution of problems by prison administrators, and prevents the circumvention of established procedures.[4]

This case illustrates the benefits of an exhaustion rule. Requiring a prisoner who complains about his medical treatment to exhaust his administrative remedies by filing a complaint with the Bureau of Prisons would be likely to create a record providing

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[3] Petitioner states (Pet. 14) that it is not clear from the regulations that prison officials prepare a written response to prisoner grievances. However, Federal Prison System Program Statement 1330.7 at p.3 (1979) makes clear that "[r]esponses shall be in writing." That requirement is reflected in the regulations, which provide that inmates and members of the public must have access to the responses and to an index describing the grievances. 28 C.F.R. 542.12.

[4] Petitioner notes (Pet. 10) that the regulations do not provide for the consideration of "tort claims," see 28 C.F.R. 542.12, and suggests that his claim "is categorically excluded from being heard under the regulations." But the regulations provide for the consideration of "a complaint which relates to any aspect of [the complainant's] imprisonment if less formal procedures have not resolved the matter." 28 C.F.R. 542.10. Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated by prison medical personnel and would be able to provide various forms of relief -- including the provision of alternative medical treatment -- even though they are not authorized to award money damages in such cases. In fact, as noted above, petitioner has filed a number of grievances complaining about his medical treatment since the district court dismissed his Bivens action, and the warden has responded to each complaint.

background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints. Furthermore, the filing of such a complaint with the Bureau of Prisons would not only assist the district court if a Bivens suit is ultimately brought, it might serve to conciliate or resolve the underlying issues and thus render a Bivens action unnecessary. Thus, the court of appeals acted reasonably in upholding a requirement of exhaustion.

In this case, the district court dismissed petitioner's Bivens action without prejudice for failure to exhaust administrative remedies. Other courts agree that dismissal without prejudice is warranted in cases like this. Davis v. Keohane, 835 F.2d 1147, 1149 (6th Cir. 1987); Veteto v. Miller, 794 F.2d 98, 100 (3d Cir. 1986). Therefore, petitioner will be able to refile his Bivens action, if he desires, as soon as his most recent grievance is decided. At that time, he will have exhausted his administrative remedies, and the district court will have the benefit of the record that has been compiled.

2. The disagreement in the circuits does not, in our view, warrant this Court's attention. As an initial matter, the courts of appeals agree that exhaustion must be required in some circumstances before a prisoner may bring a Bivens action. Thus, like the court below, the Third Circuit requires the exhaustion of administrative remedies when a federal prisoner seeks injunctive relief as well as money damages. Veteto v. Miller; Waddell v.

Alldredge, 480 F.2d 1078 (1973). Similarly, in Davis v. Keohane, 835 F.2d at 1149, the Sixth Circuit required exhaustion because the prisoner had not "clearly shown that exhaustion would be * * * unable to afford him the relief he requests."

Those two circuits, however, have allowed federal prisoners to proceed directly to court in certain circumstances. In Muhammad v. Carlson, the Third Circuit held that "[b]ecause a prisoner asserting only a claim for damages under Bivens apparently can obtain no relief from the Bureau of Prisons, it would serve little purpose to require him to exhaust administrative remedies before coming into the courts." 739 F.2d at 125. The court distinguished cases such as Brice v. Day, where "the prisoner is seeking more than money damages." Id. at 125 n.1. Similarly, in Goar v. Civiletti the Sixth Circuit excused a federal prisoner from exhausting administrative remedies where the prisoner sought damages only and "the alleged tortious acts were not continuing." 688 F.2d at 29. The court distinguished Brice v. Day by stating that prison administrators might have been able to cure the overcrowded conditions forming the basis of the complaint in that case, but could not remedy the damage from the assault forming the basis of the claim in Goar. Ibid.[5]

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[5] The Seventh Circuit has considered whether exhaustion of administrative remedies should be required in Bivens cases, but has not adopted a position on the issue. In Greene v. Meese, 875 F.2d 639, 643 (1989), the court suggested that "[w]hether complete exhaustion of Bureau of Prison remedies should be required even in cases where the prisoner is also seeking damages, a remedy not found in the Bureau's arsenal, may depend on what the damages are being sought for." The court added that, in certain cases, "[u]nless exhaustion is required prisoners will have an incentive

Thus, for certain Bivens actions the Third and Sixth Circuits permit district court consideration without requiring a prisoner to exhaust his administrative remedies. However, it appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice.[6] In the present case, although plaintiff seeks only damages (perhaps in an effort to avoid any exhaustion requirement[7]), it appears from his complaint (Pet. App. 11a-14a) that he suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff. That is confirmed by the grievances that petitioner has filed in the last year complaining about his medical treatment. See note 2, supra. Therefore, any Eighth Amendment violation arising out of this situation appears likely to continue absent a change in the ongoing medical treatment afforded to this

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to bypass the administrative procedures * * * by suing for damages and raising the identical issues in such suits that they would have raised in a complaint to the Bureau of Prisons if they had filed one." Ibid.

[6] No continuing prison practice was at issue in Goar, where the prisoner complained that he had been injured by an assault by another inmate. 688 F.2d at 28. In Muhammad, the prisoner made two unrelated claims. One of the claims -- based on the prisoner's placement in administrative detention for seven days -- clearly had no ongoing significance. 739 F.2d at 123. The other claim was based on the denial of medical treatment for a back injury; there was no indication in the court's opinion whether the problem was ongoing. Ibid.

[7] Petitioner alleged that "[t]his Complaint seeks 'Money Damage Awards Only' therefor is exempt to the adminstrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 et seq.)." Pet. App. 12a. He added, in a footnote to the complaint, "Presently the Plaintiff is appealing." Ibid. Thus, it seems clear that petitioner intended to split off his damage claim and pursue it in court while simultaneously seeking other relief for the same problem through administrative channels.

prisoner by the prison medical staff. It is thus not clear on these facts whether any court of appeals would forgive petitioner's failure to exhaust administrative remedies.

In any event, it may be that a uniform rule with respect to exhaustion is not required. One court recently noted that the federal courts are being "flooded by prisoner litigation." Del Raine v. Carlson, 826 F.2d 698, 702 (7th Cir. 1987). Circuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion of the Bureau of Prison's administrative remedies. Other circuits may fairly conclude that it is more efficient to handle Bivens actions with the benefit of preliminary fact-finding by the Bureau of Prisons. It is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1990

JOHN J. MCCARTHY PETITIONER	)	
V	)	NO. 90-6861
MR. MADDIGAN, ET AL.	)	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE RESPONDENTS IN OPPOSITION by mail on March 27, 1991.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

No. 90-6861

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

Respondents, in their brief, acknowledge the clear conflict among the circuits over whether a federal prisoner must exhaust administrative remedies before bringing a Bivens action seeking only damages. In light of that acknowledgement, their arguments against review, like their efforts to defend the Tenth Circuit's ruling on the merits, are unavailing.

1. While recognizing the basic conflict cited by petitioner,[1] respondents nevertheless oppose review for three

1 Notably, respondents do not even address the clear subsidiary conflict between the ruling below and the Fifth Circuit's Hessbrook decision over which administrative remedies must be

reasons. First, they observe that the courts of appeals do not disagree about an issue that is not presented in this case -- i.e., whether a federal prisoner who seeks both injunctive relief and damages must exhaust administrative remedies. Br. in Opp. 8-9. Whatever the validity of that observation, see Pet. 7 n.4, it simply has no bearing on whether the Court should grant the petition in this case.

Second, respondents suggest that conflicting decisions in the Third and Sixth Circuits are distinguishable because in those cases the prisoners were not complaining about "continuing prison practice[s]." See Br. in Opp. 10-11 & n.6 (citing Muhammad v. Carlson, 739 F.2d 122 (3d Cir. 1984) and Goar v. Civiletti, 688 F.2d 27 (6th Cir. 1982)); see also id. at 10 ("[I]t appears that neither circuit would excuse exhaustion when a prisoner challenges a continuing prison practice."). In drawing this purported distinction, however, respondents have had to rewrite the decisions they try to reconcile with the ruling below. As the Tenth Circuit in this case recognized, Goar, Muhammad, and the many cases following them, see Pet. 8 n.6, focus solely on the type of relief sought by the prisoner. See Pet. App. 2a (Goar and Muhammed "hold that a federal prisoner seeking only

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exhausted by federal prisoners prior to bringing a Bivens action. See Pet. 10 n.7. However, they do apparently reject the Hessbrook rule -- previously supported by the Solicitor General -- that a federal prisoner bringing a Bivens action must exhaust the separate FTCA administative procedures. Compare Br. in Opp. 3 n.1 ("The administrative remedy in question is that set forth . . . in 28 C.F.R. 542.10-542.16."), with Br. for the United States in Opp., Prows v. Black (No. 88-6970), at 6-7.

money damages in a Bivens-type action need not first exhaust administrative remedies"). There is no basis for thinking that the Third and Sixth Circuits would require exhaustion in a pure damages case if the problem underlying the complaint appeared to be continuing or recurrent.

In any event, respondents' effort to treat this case as turning on a "continuing prison practice," Br. in Opp. 10-11, is unavailing -- first, because nothing in the decision below relies on such a characterization; and second, because the characterization is wrong. Relying on materials that are neither in the record nor properly the subject of judicial notice (since they are "subject to reasonable dispute," Fed. R. Evid. 201(b)), respondents assert that petitioner has filed a number of independent administrative grievances involving unspecified "medical treatment he was receiving." Br. in Opp. 4 n.2. Even if true, however, this assertion does not change the fact that in this case, petitioner complained only about one specific problem with medical care and sought only damages as relief.[2] Moreover, respondents neglect to note that, last month, petitioner was transferred out of the penitentiary at Leavenworth to another federal facility. That development extinguishes any possibility

---

2 To the extent that respondents' "continuing conditions" argument attempts to extend petitioner's claim backward in time, it also rests on a misreading of petitioner's complaint. Compare Br. in Opp. 10 (contending that petitioner, in his complaint, alleges that he "suffers from continuing physical and psychiatric problems and believes he has never received adequate medication from the prison staff") with Pet. App. 12a-13a (the actual complaint, which focused on denial of adequate medical care over a period of several months following a recent back operation).

that the prison grievance procedure could now address any issue of "ongoing" care at Leavenworth raised implicitly by petitioner's lawsuit.

As a third and final argument against review, respondents suggest that "a uniform rule with respect to exhaustion is not required." Id. at 11. Explaining that "[c]ircuits with greater resources and fewer federal prisoners within their boundaries may be less inclined to require exhaustion," respondents conclude that "[i]t is not clear that all circuits (or even all districts within the same circuit) must -- or indeed ought to -- handle Bivens cases through identical procedures." Ibid.

This argument is meritless. To begin with, respondents fail to provide any references to case law, or even any statistics, supporting the idea that the circuits have divided on the basis of their relative resources or case loads. More importantly, it makes no sense to advocate a rule requiring exhaustion of the Bureau of Prisons' (BOP) grievance procedure in some jurisdictions but not in others. That procedure, after all, is set forth in a nationally applicable regulation and provides in all cases for a final appeal to the same official -- the Bureau's General Counsel. See Pet. App. 9a-10a (28 C.F.R. § 542.15). If a prisoner is seeking only damages, exhaustion will be equally beneficial, or futile, regardless of his prison's particular location. Finally, tolerance of continued intercircuit disarray on this issue will create enormous uncertainties for prisoners in circuits that have not yet spoken. In seeking to vindicate their constitutional rights, they will be

forced to guess about which rule will ultimately be applied to them.

2. On the merits of the exhaustion issue, respondents concede that the BOP's administrative grievance procedure does not allow for an award of damages, the only type of relief sought by petitioner. See Br. in Opp. 7 n.4. They nonetheless maintain that the decision below is correct because exhaustion of BOP remedies may achieve certain salutary effects, including "filtering out frivolous or readily resolvable disputes, facilitating development of a factual record, and narrowing the issues in dispute." Id. at 7.

Without delving much further into the merits at this stage, we would simply note that respondents' arguments in this regard are deeply flawed. To begin with, as we noted in our petition, see Pet. 10, the BOP grievance procedure flatly excludes consideration of inmate "tort claims." Pet. App. 9a (28 C.F.R. § 542.12). Respondents seek to avoid this problem by pointing to an earlier general section in the regulations allowing an inmate to "seek formal review of a complaint which relates to any aspect of his imprisonment." Pet. App. 8a (28 C.F.R. § 542.10); see Br. in Opp. 7 n.4. But even respondents do not appear to contend that this general section authorizes consideration of a complaint that is a pure tort claim -- i.e., one that seeks only monetary compensation for past conduct.[3]

---

3 See Br. in Opp. 7 n.4 ("Thus, prison officials would respond to any complaint alleging that a prisoner is being mistreated . . . .") (emphasis added).

Thus, respondents' argument that petitioner's grievance would have been entertained in the administrative process depends on their own unsupported characterization of the grievance as one seeking to forestall ongoing mistreatment.

Even if the BOP would entertain petitioner's tort claim, respondents are simply incorrect in predicting that exhaustion would "provide[] many benefits associated with prior administrative consideration." Br. in Opp. 7. First, as we noted in our petition, respondents vastly overstate the value of any paper "record" likely to be compiled through the BOP grievance procedure. Pet. 14-15. Nor is it an answer to point out, as respondents do, that an internal BOP policy statement requires prison officials to respond "in writing" to grievances. Br. in Opp. 7 n.3. Presumably that requirement would be satisfied by sending the grievant a letter stating simply, "Your grievance is denied."[4]

Second, even if the BOP grievance procedure were to produce "a record providing background on the nature of the prisoner's medical needs, the details of his complaints to the medical staff, and the response of the medical staff to the prisoner's complaints," id. at 7-8, it would be an abdication of judicial duty for a court to rely on such a record in deciding, for example, to dismiss a prisoner's complaint as frivolous under 28 U.S.C. § 1915(d). Third, respondents are wrong in suggesting that the BOP's administrative remedies might "serve to conciliate or resolve" petitioner's claims. Br. in Opp. 8. Since petitioner's complaint sought only damages, and respondents concede that the grievance procedure does not allow for the award of monetary relief, id. at 7 n.4, there is no way that the grievance procedure could have "resolved" anything.[5]

As these factors make clear, it simply makes no sense to require a prisoner who seeks only damages to exhaust the BOP administrative process. Such a requirement entails not only delay in the vindiction of constitutional rights but the real possibility of forfeiture of a valid claim. See Pet. 13-14. And it serves no valid purpose.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

4 Respondents' related suggestion that the grievance procedure will provide useful "discovery" should be rejected out of hand. Br. in Opp. 7-8; see also Pet. App. 4a. Given the absence of formal mechanisms capable of creating a useful record, it is unlikely that the BOP's procedure will in fact yield any detailed new information. More fundamentally, respondents have cited no authority suggesting that it is appropriate to adopt an exhaustion requirement for the purpose of expanding the discovery provisions of the Federal Rules of Civil Procedure.

5 Respondents suggest that Congress would favor exhaustion here, citing the statutory provisions governing exhaustion in section 1983 actions by state prisoners. See Br. in Opp. 5-6. But as we explained in our petition, Congress has authorized states to avoid the nonexhaustion rule of Patsy v. Board of Regents, 457 U.S. 496 (1982), only where the state enacts an administrative grievance procedure that offers to state prisoners, among other things, "plain, speedy, and effective administrative remedies." 42 U.S.C. § 1997e(a)(1) (emphasis added). See Pet. 16-18. Because the BOP's administrative remedies would fail that test -- a point not disputed by respondents -- requiring federal prisoners to exhaust those remedies would run afoul of the available congressional intent on the issue presented by this case.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

As a member of the bar of this Court, I hereby certify that one copy of the Reply Brief for Petitioner in McCarthy v. Maddigan, No. 90-6861, was served by first-class mail, postage prepaid, this 4th day of April, 1991, on the following:

Mr. Lee Thompson
U.S. Attorney, Kansas
444 S.E. Quincy
Topeka, KS 66683

The Honorable Kenneth Starr
Solicitor General of the United States
Department of Justice
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Paul M. Smith
Counsel for Petitioner

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April 4, 1991

HAND DELIVERED

Mr. William Gullickson
Clerk's Office
United States Supreme Court
Washington, D.C. 20543

RE: McCarthy v. Maddigan, et al., No. 90-6861

Dear Mr. Gullickson:

In accordance with our telephone conversation earlier today, I have enclosed for filing, pursuant to Supreme Court Rules 15.6 and 39, an original and 10 copies of the Reply Brief for Petitioner in support of the petition for a writ of certiorari in the above-captioned case. A certificate of service is also enclosed.

Sincerely,

Alan E. Untereiner

AEU:jc
Enclosures

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FILED
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No. 90-6861 (5)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 18, 1991
CERTIORARI GRANTED APRIL 22, 1991

22pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
April 3, 1990	—Complaint filed
April 6, 1990	—Order dismissing action without prejudice filed
April 16, 1990	—Motion for Relief from Judgment filed
April 19, 1990	—Order denying Motion for Relief from Judgment filed
September 20, 1990	—Opinion of the United States Court of Appeals for the Tenth Circuit filed

JOHN J. MCCARTHY #38051-066 *pro se*
State No; 14163
United States Penitentiary
P.O. Box 1000
Leavenworth, Kansas., 66048

[Name, prison registration
number and place of
confinement]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Case No. 90-3101-R

JOHN J. MCCARTHY #38051-066
State No; 14163

Plaintiff

versus

Mr Maddigan Hospital Administrator
Dr Perry Chief Psycholigest
Dr Walters Psycholigest
Dr Delmuro, individually and in their
official capacities,

Defendants

COMPLAINT FOR DAMAGES BY FEDERAL PRISONER PURSUANT TO 28 U.S.C. 1331

[Filed Apr. 3, 1990]

I. *Previous Law Suits*

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes [x] No [ ]

B. If your answer to A is yes, describe the lawsuit in the space below. [If there are more than one lawsuit, describe the additional lawsuit on a separate page using the same outline.]

1. Parties to this previous lawsuit

   Plaintiffs _____

   Defendants _____

2. Court [if federal court, name the district; if state court, name the county]

3. Docket Number _____

4. Name of judge to whom case was assigned _____

5. Disposition [for example, was the case dismissed? Was it appealed? Is it still pending?] _____

6. Approximate date of filing lawsuit _____

7. Approximate date of disposition _____

II. *Place of Present Confinement*

United States Penitentiary Leavenworth

A. Is there a prisoner grievance procedure in this institution?

Yes [x] No [ ]

B. Did you present the facts relating to your complaint in any administrative remedy request, parole appeal, or other procedure available at your institution? Yes [x] No [ ]

C. If your answer is YES,

1. What steps did you take? Filed pursuant to 28 C.F.R. Part 542 *et seq*

2. What was the result? Denied

D. If your answer is NO, explain why or explain why exhaustion of administrative remedies is not necessary in your case . .

E. If there is no prison grievance procedure or applicable parole appeal available at your institution, did you complain to prison or parole authorities? Yes [x] No [ ]

F. If your answer is YES,

1. What steps did you take? I discussed the problem with each named defendant.

2. What was the result? Denied/Egnored

III. *Parties*

[In item A below, place your name in the first blank and place your current address in the second blank]

A. Name of plaintiff John J. McCarthy #38051-066 (state No; 14163)

Address P.O. BOX 1000 Leavenworth, KS., 66048

[In item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third bank. Use item C for the names, positions and places of employment of any additional defendants.]

B. Defendant Mr Maddigan is employed as Leavworth Hospital Administrator at United States Penitentiary

C. Additional defendants Dr Perry/Dr Walters/ Dr Delmuro

IV. *Statement of Claim(s)*

[State here as briefly as possible the *facts* of your case. Describe how each defendant is involved.

Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or statutes. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.]

I am a State Prisoner held in Federal Custody pursuant to 18 U.S.C. 5003 I have a history for psychatriciat problems and medical problems because a few months ago I had a opperation on my spine at springfield. I am always in pain because of the opperation and I am being denied Pain medication/singel cell/psychtrist help and medication. On March 28/1990 I appealed to Dr Delmuro for medication and a singel cell because I am in pain and up all night and this causes problems with my cellmate. Dr Delmuro egnored me. I then went and complained to the Hospital Administrator Mr. Maddigan pursuant to the above and he claimed that he is not a doctor and therefor cannot help he also he said that I have nothing comming regardless of my previous conditions. I then went and say Dr Perry Chief Psycholigest and complained that Dr Walters on several occausions denied to me any treatment pursuant to my mental problems of stress and other things. They claimed regardless of my past history I will not be treated for anything and that its to bad. I have been medically unassigned ever since I entered the penitentiary I cannt work because of my medical condition and also I am in pain all the time. The action above constitutes deliberate indeference.

V. *Relief*

[State briefly exactly what you want the court to do for you. If you are seeking monetary damages

against some but not all defendants, identify which defendant(s) you desire to make liable for such damages. Also state whether you desire a jury trial on all issues triable by jury. Make no legal arguments in this space. Cite on cases or statutes.]

This case is for money damages only therefore I do not have to exhaust administrative apprals. Grant a Jury Trial and $100.000.00¢ in Compensatpry/punitive/actual damages against each defendant individually and seperately.

Signed this 28 day of March, 1990.

/s/ John J. McCarthy
[Signature of plaintiff]

I declare under penalty of perjury that the foregoing is true and correct.

/s/ John J. McCarthy
[Signature of plaintiff]

March 28, 1990
[Date]

UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

Civil No. _____

JOHN J. MCCARTHY, #38051-066
State No. 14163

[*Plaintiff*]

v.

HOSPITAL ADMINISTRATOR MADDIGAN
CHIEF PSYCHOLOGIST DR. PERRY
DR. WALTERS
DR. DELMURO
UNITED STATES PENITENTIARY
LEAVENWORTH, KANSAS, 66048-1000

[*Defendant's.*]

Civil Rights Complaint 28 U.S.C. 1331

"With a Jury Demand"

This Complaint seeks Money Damages Only.

COMPLAINT

1. *JURDISCITION;*
   1. 28 U.S.C. 1331
   2. 18 U.S.C. 4042
   3. 18 U.S.C. 5003

2. *PARTIES;*

a. *Plaintiff;*

John J. McCarthy #38051-066 (state No; 14163) is a State of Connecticut prisoner held in Federal Custody pursuant to 18 U. S. C. 5003., and Conn. Gen. Statute 18-91. He is above the age of eighteen years and a tax payer, he is serving sentences for non-violent crimes of Larceny in the first degree cited as *State v. McCarthy*, 197 CONN 257 (1985)., *State v. McCarthy*, 197 CONN 166 (1985).

b. Defendant's;

Maddigan/Perry/Walters/Delmuro are all staff at the United States Penitentiary Leavenworth and work under color of United States Law pursuant to Statutes/ Regulations/Contracts and Agreements. They are above the age of eighteen years and tax payers. Each are sued in boath capacities-officially as well as individually.

3. *THIS COMPLAINT IS EXEMPT TO THE ADMINISTRATIVE APPEALS EXHAUSTION DOCTRINE*

This Complaint seeks "Money Damage Awards Only" therefor is exempt to the administrative appeals exhaustion doctrine. (see; 28 C.F.R. Part 542 *et seq*)[1]

4. *FACTS;*

1. The plaintiff is a State prisoner held in Federal Custody pursuant to 18 U.S.C. 5003., Conn. Gen. Statute 18-91 and a "written contract agreement" pursuant to 18 U.S.C. 5003 (a). The Federal Bureau of prisons has a Statutory duty to provide "medical" treetment to the plaintiff pursuant to 18 U.S.C. 5003 (c) and 4042 (2) *Id.*

[1] Presently the Plaintiff is appealing.

2. The Plaintiff has a long history for serious medical needs. A few months ago he experienced a opperation on his spinal collum at the United States Medical Center at Springfield Missouri. The opperation was unsuccessfull and the plaintiff is in pain most of the time. The Plaintiff also has a history for psychatric care and on several occausions while held in other Federal Penitentiaries was treated with medications because he is unable to cope with stress.

3. For several months the Plaintiff on occasion cpmplained to medical staff about his Back pain and requested medication. The only medication that was ever prescribed was *insignificant* and at times the Plaintiff was forced to purchase contraband drugs. Also the Plaintiff complained to medical staff that because of his back injury and pain problems he is persistently staying up at all hours of the night, he has to lay on the floor and pull on his legs this causes his cellmate to kept up and causes problems between them. The Plaintiff requested a singel cell and staff persistently egnored him.

4. On March 28/1990 the Plaintiff appealed personally to Dr Delmuro for pain medication/a singel cell/ stress medication. Dr Delmuro flagerently egnored the plaintiff and told him that if he was not satisfied to see the hospital administrator Defendant Maddigan. The plaintiff then went and saw Defendant Maddigan and explained his situation to him. Defendant Maddigan claimed that he was not a doctor and therefor could not treat the plaintif and that if he did not like his response to complain to the Warden.[2]

The Plaintiff then went and saw Chief psycholigest Defendant Perry and explained to his that for over a month now he was having these problems and that he had previously scene Defendant Dr Walters complaining of these problems and other problems and that Dr Walters was

[2] The Plaintiff has written the Warden who fails to respond

not going to request a medication untill after the plaintiff seen Dr Delmuro or other hospital staff. The plaintiff informed Dr Perry that he had seen hospital staff and they refused to treat him and that this and related problems were causing stress and violent reactions.

The Plaintiff then went and saw Dr Walters and appealed to him again and Dr Walters claimed that he would not treat the plaintiff.

The Plaintiff then returned and saw Dr Perry explaining the above and Dr Perry attempted to make a joke of the hole situation and laughed.

5. *CONCLUSION AND CONSTITUTIONAL VIOLATIONS;*

1. The action outlined in *FACTS* violates the United States Constitution eighth amendment and is in fact deliberate indefference to serious medical needs.

2. The action outlined *Id.*, violates 18 U.S.C. 5003 the "written contract agreement" and 18 U.S.C. 4042 (2) as well as 28 C.F.R. Regulations 0.95 and 0.96.

3. The action of the Defendant's denying to the plaintiff medication for pain and stress causes plain and suffering and violates the Eighth Amendment of the United States Constitution.

6. *RELIEF;*

Plaintiff seeks "Money Damage Awards Only" in the following ammounts and manner;

1. $100.000.00¢ Compensatory

2. $100.000.00¢ Punitive

3. $100.000.00¢ Actual

4. All Costs for this litigation to be taxed to the Defendant's.

5. All damage awards to apply separately and appear to each and every defendant appart.

6. A Jury Trial on all issues.

7. *VARIFICATION;*

I swear and state under penalty of purjury and the law that the forgoing is true and correct; Executed on 28 day 3 month, 1990 By The Plaintiff;

/s/ John J. McCarthy

John J. McCarthy #38051-066 (state No; 14163)

I swear and state the forgoing to be true and correct; Executed; day 28 month 3 1990 By The Plaintiff;

/s/ John J. McCarthy

John J. McCarthy #38051-066 (state no; 14163)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 90-3101-R

JOHN J. MCCARTHY,
Plaintiff,

v.

MR. MADDIGAN, *et al.*,
Defendants.

ORDER

This matter is before the court on a civil rights complaint filed pursuant to 28 U.S.C. § 1331. Plaintiff, a Connecticut prisoner housed at the United States Penitentiary, Leavenworth, Kansas, (USPL), alleges that defendants have demonstrated deliberate indifference to his medical needs in violation of the Eighth Amendment. Plaintiff seeks damages.

The court finds that plaintiff has failed to demonstrate his use of the administrative remedy process provided by the Bureau of Prisons. Use of the administrative remedy process is a prerequisite to federal judicial review. *See Lane v. Hansberry*, 593 F.2d 648 (5th Cir. 1979); *Brice v. Day*, 609 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980); *Rivera v. Toft*, 477 F.2d 535 (10th Cir. 1973). Further, the administrative remedy process is necessary for the proper and effective handing of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance. *Brice*, 604 F.2d at 667.

IT IS THEREFORE ORDERED that this action is hereby dismissed without prejudice. The clerk of the

court is directed to transmit a copy of this order to plaintiff.

DATED: This 6th day of April, 1990 at Topeka, Kansas.

/s/ Dale E. Saffels
RICHARD D. ROGERS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

(Title Omitted in Printing)

ORDER

This matter is before the court on plaintiff's motion for relief from judgment pursuant to Fed. R. Civ. Pro. 60(b) and plaintiff's Notice of Appeal, filed simultaneously with this court.

Plaintiff was permitted to proceed in this action in forma pauperis. The action was dismissed without prejudice by this court's Order dated April 6, 1990. Plaintiff has filed a Notice of Appeal from the order of dismissal, and, pursuant to Rule 24(a) of the Federal Rules of Appellate Procedure, might appeal in forma pauperis without further authorization in the absence of a certificate prescribed by the second paragraph of that rule.

The court first finds the motion for relief from judgment should be denied. The court dismissed this action without prejudice due to plaintiff's failure to exhaust available administrative remedies. Plaintiff had provided no new evidence, and the arguments made by plaintiffs do not persuade the court that its prior ruling should be disturbed.

For the reasons set forth in the Order of April 6, 1990, and because plaintiff makes no allegations on appeal, the court further finds that the appeal is legally frivolous and is not taken in good faith.

IT IS THEREFORE ORDERED that plaintiff's motion for relief from judgment be denied.

IT IS FURTHER ORDERED that plaintiff is hereby denied leave to proceed in forma pauperis on appeal. The clerk of the court is directed to transmit a copy of this order to plaintiff and

DATED: This 19th day of April, 1990, at Topeka, Kansas.

/s/ Richard D. Rogers
RICHARD D. ROGERS
United States District Judge

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-3112

JOHN J. MCCARTHY,
Plaintiff-Appellant,

v.

MR. MADDIGAN, DR. PERRY; DR. WALTERS, DR. DELMURO,
Defendants-Appellees.

Sept. 20, 1990

Before McKAY, MOORE, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed.R.App.P. 34(a)(1); 10th Cir.R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Appellant John J. McCarthy appeals the district court's dismissal of his civil rights claim filed pursuant to 28 U.S.C. § 1331 and the court's denial of his motion for relief from judgment made pursuant to Fed.R.Civ.P. 60(b). Appellant alleges that the deliberate indifference to his serious medical needs of officials of the federal penitentiary in Leavenworth, Kansas, violates his Eighth

Amendment rights, and he seeks damages. The district court dismissed the claim without prejudice because Mr. McCarthy failed to demonstrate he had made use of the administrative review process provided by the Bureau of Prisons, as required by *Brice v. Day*, 604 F.2d 664, 666-68 (10th Cir.1979), *cert. denied*, 444 U.S. 1086, 100 S.Ct. 1045, 62 L.Ed.2d 772 (1980). District Court Order of April 6, 1990. For the reasons cited in its first order, and because appellant failed to present any new evidence, the district court also denied appellant's motion for relief from judgment. District Court Order of April 19, 1990.

Appellant argues that the law in this circuit is unsettled as to whether exhaustion of administrative remedies is required in a *Bivens*-type action, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), where a federal prisoner seeks only money damages to redress an alleged constitutional violation. He urges us to follow certain cases from the Third and Sixth Circuits rejecting such a requirement.

The appellants in *Brice v. Day*, argued, as does Mr. McCarthy, that the exhaustion of administrative remedies requirement does not apply where damages are sought for a violation of a constitutional right. 604 F.2d at 665. One of the appellants in *Brice* sought monetary damages and "what other relief the court deems fair." *Id.* This court held that "preliminary fact-finding would be necessary to determine whether there is a possible *Bivens* cause of action. . . . Thus, if we assume that the petitions before us could indicate a *Bivens* cause of action as the appellants argue, we must . . . require an initial administrative inquiry." *Id.* at 666. *Brice* made clear that "this administrative consideration is not to resolve constitutional issues nor to consider damages," *id.* at 667, but simply to develop a factual record to assist the district court in its review.

Appellant relies principally on *Muhammad v. Carlson*, 739 F.2d 122 (3d Cir.1984), and *Goar v. Civiletti*, 688

F.2d 27 (6th Cir.1982), both of which hold that a federal prisoner seeking only money damages in a *Bivens*-type action need not first exhaust administrative remedies. *Muhammad* and *Goar*, however, do not state the law in this circuit. Moreover, these cases mischaracterize this circuit's holding in *Brice*. According to the Third Circuit, *Brice* held that a "federal prisoner seeking damages and other relief for overcrowded conditions must exhaust administrative remedies." 739 F.2d at 125 n. 1; *cf.* 688 F.2d at 29. The rule of *Brice*, however, is not keyed to the type of relief sought, but to the need for preliminary fact-finding. *Brice* does not except cases involving claims for monetary damages only.

We also disagree with the Third Circuit's assumption that the courts "may not take it upon ourselves to impose a judicially-created exhaustion requirement directed at federal prisoners." 739 at 125. Given that *Bivens* actions are "a creation of the judiciary," *id.* at 124; *accord Brice*, 604 F.2d at 665, it follows that the courts may, and indeed must, establish reasonable requirements for bringing such actions. Furthermore, as the Sixth Circuit recognized in *Goar*, "[a]lthough the administrative apparatus could not award money damages . . . , administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." 688 F.2d at 29 (emphasis in original).

We further note that in *Hessbrook v. Lennon*, 777 F.2d 999, 1007 n. 14 (1985), the Fifth Circuit correctly construed our holding in *Brice* and declined to adopt the Third and Sixth Circuits' view on this issue. We agree with the *Hessbrook* panel that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their . . . treatment during confinement." 777 F.2d at 1007.

We find no merit in the other cases cited by appellant, Appellant's Opening Brief at 3, nor do they alter our conclusion that preliminary fact-finding is necessary in this case, as it was in *Brice*, to determine whether appellant has a possible *Bivens* cause of action. *See* 604 F.2d at 666; *cf. Hatcher v. Office of Comptroller of Currency*, 631 F.2d 985, 989 n. 6 (D.C.Cir.1980) (citing *Brice*). Furthermore, although appellant alleged in his complaint that he had invoked the prison grievance procedure prior to filing this suit, he does not challenge on appeal the district court's finding that he "failed to demonstrate his use of the [available] administrative remedy process." Order of April 6, 1990, at 1.

Accordingly, we grant permission to proceed in forma pauperis, and the order of the district court is AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 90-6861

JOHN J. MCCARTHY,
Petitioner

v.

MR. MADDIGAN, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
U.S. COURT OF APPEALS
TENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 22, 1991

FILED
JUN 20
1991
OFFICE OF THE CLERK

No. 90-6861

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether a federal prisoner who seeks only money damages for an alleged violation of his constitutional rights by prison officials must, before bringing a *Bivens* action in federal court, exhaust administrative remedies in the Bureau of Prisons, even though the inmate grievance procedure is inherently inadequate since it does not allow for any award of monetary relief.

LIST OF PARTIES

As required by Rule 24.1(b) of the Rules of this Court, petitioner includes the following list of all parties to the judgment below: the plaintiff-appellant is John J. McCarthy; and the defendant-appellees are Mr. Maddigan, Dr. Perry, Dr. Walter, and Dr. Delmuro.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-6861

JOHN J. MCCARTHY,

Petitioner,

v.

MR. MADDIGAN, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 914 F.2d 1411 and reprinted at J.A. 16. The unpublished orders of the United States District Court for the District of Kansas dismissing petitioner's action and denying his motion for relief from judgment are reprinted at J.A. 12 & 14, respectively.

JURISDICTION

The Tenth Circuit entered judgment on September 20, 1990. J.A. 16. On December 7, 1990, Associate Justice Byron White granted petitioner's application for an en-

largement of time in which to file the petition for certiorari, to and including January 18, 1991. The petition was filed on that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATIONS INVOLVED

This case involves the Eighth Amendment to the United States Constitution as well as federal regulations governing administrative remedies available to resolve the grievances of prisoners in federal custody. The Eighth Amendment provides in full, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The relevant Bureau of Prisons regulations are codified at 28 C.F.R. § 542.10 *et seq.* (1990), and set forth in the appendix to this brief.

STATEMENT

In this *Bivens* action, brought by a prisoner in federal custody against four prison officials, the district court dismissed the complaint on the ground that petitioner had failed to exhaust the Bureau of Prisons (BOP) administrative grievance procedure. The court of appeals affirmed this dismissal, even though the grievance procedure was never designed to serve as a mandatory prelude to *Bivens* litigation and cannot provide the sole relief—damages—sought in such cases.

1. The BOP grievance procedure, codified at 28 C.F.R. §§ 542.10-.16 (1990), authorizes a federal prisoner to "seek formal review of a complaint which relates to any aspect of his imprisonment." *Id.* § 542.10. Prisoner complaints are not entertained, however, if they involve "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates." *Id.* § 542.12. Under the procedure, a prisoner must first seek "informal resolution" of his claim by consulting with prison "staff." *Id.* § 542.13

(a). If these informal efforts fail, the prisoner may file a "formal written complaint" with the warden "within fifteen (15) calendar days of the date on which the basis of the complaint occurred." *Id.* § 542.13(b). If the warden fails to respond to the inmate's satisfaction within fifteen more days, the inmate has twenty days to appeal to the BOP Regional Director. *Id.* §§ 542.14-.15. The Regional Director, in turn, has thirty days to respond. *Id.* § 542.14. If the inmate is dissatisfied with this response, he may appeal to the BOP General Counsel within thirty days. *Id.* § 542.15. The General Counsel must then provide the BOP's final response within thirty days. *Id.* § 542.14.[1]

The regulations include no provision for any monetary payments to grievants. Nor do they require that any particular factfinding method be employed by prison officials in responding to a prisoner's claims. *See id.* § 542.11(a)(1) (warden, Regional Director, and General Counsel must "[e]stablish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate"). No hearing is required. In sum, the main right conferred on inmates is the right to receive written responses to their complaints from three levels of the BOP administrative hierarchy.

2. While incarcerated in the federal penitentiary at Leavenworth, Kansas,[2] petitioner John J. McCarthy filed

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[1] The deadlines for responses by the warden, Regional Director and General Counsel may be doubled where necessary. 28 C.F.R. § 542.14. The deadlines for inmate filings may be extended by unspecified amounts for unspecified "valid reason[s]." *Id.* §§ 542.13(b), .15.

[2] Petitioner, who is serving time on a Connecticut conviction, was initially transferred to the federal system pursuant to 18 U.S.C. § 5003. At the time he filed both his complaint and his petition for certiorari in this case, he was incarcerated at Leavenworth. Subsequently, but before he filed his reply brief in support of the petition in this Court, petitioner was transferred from Leavenworth

a *pro se Bivens* action on April 3, 1990, against four prison employees—the hospital administrator, the chief psychologist, and two physicians. In his complaint,[3] petitioner claimed that defendants had abridged his Eighth Amendment rights through deliberate indifference to his serious medical needs. J.A. 9-10.[4] More specifically, he alleged that in the two months following surgery on his spinal column at a prison hospital, he had suffered from persistent and severe back pain, for which he repeatedly but unsuccessfully sought effective treatment from the defendants. *Id.* The pain resulting from his condition, petitioner contended, had caused him to "persistently stay[] up at all hours of the night" and to lie "on the floor and pull on his legs," which in turn "cause[d] his cellmate to [be] kept up and cause[d] problems between them." *Id.* at 9. Construed liberally, McCarthy's complaint also alleged that his pain was exacerbated by his inability "to cope with stress," a psychiatric condition for

to another federal facility. *See* Reply Br. for Petitioner 3. At present, he is incarcerated at the Connecticut Correctional Institution at Somers.

[3] Petitioner actually filed two separate complaints on the same day: one a standard form used for prisoner complaints which he filled in (*see* J.A. 2-6), the other typed out on blank paper (*see* J.A. 7-11). For the purposes of this brief, we refer to them together as a single complaint.

[4] Petitioner also alleged a violation of 18 U.S.C. § 4042, which requires the Bureau of Prisons to "provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise." 18 U.S.C. § 4042(2). *See* J.A. 10. Perhaps because courts have uniformly held that Section 4042(2) provides no private right of action, *see, e.g., Chinchello v. Fenton*, 805 F.2d 126, 134 (3d Cir. 1986); *Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969); *Gibson v. Matthews*, 715 F. Supp. 181, 188-90 (E.D. Ky. 1989), *aff'd on other grounds*, 926 F.2d 532 (6th Cir. 1991), both the district court and the court of appeals characterized petitioner's complaint as alleging only an Eighth Amendment violation and ruled on this basis. *See* J.A. 12, 16-17.

which he had received treatment in the past. *Id.* at 9-10. Petitioner further contended that his repeated requests for effective medical treatment were ignored or refused, that Dr. Walters refused to treat him, and that Chief Psychologist Perry "attempted to make a joke of the [w]hole situation and laughed." *Id.*

To redress these alleged constitutional violations, McCarthy sought damages "against each defendant individually and separately." *Id.* at 6.[5] Petitioner did not request declaratory or injunctive relief.[6] He stated repeatedly that he was seeking "money damages only," *see id.* at 6, 7, 8, 10, and went on to contend that, for this reason, he was not required to exhaust administrative remedies, *id.* at 6, 8.[7]

Three days after the complaint was filed, the district court dismissed McCarthy's action without prejudice on the ground that he had failed to demonstrate exhaustion of the BOP administrative remedies. *Id.* at 12. Relying

[5] Petitioner requested $100,000 in compensatory, $100,000 in punitive, and $100,000 in "[a]ctual" damages, as well as costs. J.A. 10.

[6] Though petitioner's complaint alleged that he had "requested a sing[le] cell and staff persistently [i]gnored him," J.A. 9; *see also id.* at 5 (alleging denial of single cell), his complaint did not seek transfer to a single cell as a remedy.

[7] Petitioner did state in response to questions on the inmate complaint form that he had filed a grievance under 28 C.F.R. § 542, which had been denied. J.A. 3-4. He also noted in passing that he was "[p]resently . . . appealing" this denial. *Id.* at 8 n.1; *see also id.* at 9 n.2 (noting that petitioner had "written the Warden who fails to respond"). At the time the complaint was filed, petitioner apparently had a pending administrative claim related to the "single cell" issue mentioned in the complaint. *See* Plaintiff's Motion for Relief from Judgment, Exh. A (Aug. 15, 1990). With respect to the medical issues at the heart of his complaint, however, petitioner did not file a grievance until after the federal complaint was dismissed. *See id.*, Exh. B. An appeal from the warden's denial of that grievance was ultimately rejected as untimely by the BOP regional office. *See id.*

on the Tenth Circuit's decision in *Brice v. Day*, 604 F.2d 664 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980), the district court held that "[u]se of the administrative remedy process is a prerequisite to federal judicial review." J.A. 12. The court explained that "the administrative remedy process is necessary for the proper and effective handling of prisoner complaints and serves as a form of discovery in an attempt to resolve the grievance." *Id.*

On appeal, the Tenth Circuit affirmed. J.A. 16-19. The court of appeals rejected petitioner's argument that the exhaustion requirement recognized in *Brice* should not apply where a prisoner seeks only damages—a remedy not provided in the grievance process. The court held that preliminary administrative "factfinding" is just as necessary in a pure damages case as in an injunctive case, "to determine whether there is a possible *Bivens* cause of action." *Id.* at 17 (quoting *Brice*, 604 F.2d at 666). In so doing, it expressly disagreed with decisions in two other circuits—*Muhammad v. Carlson*, 739 F.2d 122 (3d Cir. 1984), and *Goar v. Civiletti*, 688 F.2d 27 (6th Cir. 1982)—which held that exhaustion is not required in a pure damages case. The court of appeals also observed that "administrative consideration of the possibility of corrective action and a record would have aided a court in measuring liability and determining the *extent* of the damages." J.A. 18 (emphasis in original) (citation and internal quotations omitted). Finally, the Tenth Circuit noted petitioner's allegation in his complaint that he "had invoked the prison grievance procedure prior to filing this suit," but added that petitioner did not challenge the district court's finding of failure to exhaust. *Id.* at 19.[8]

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[8] *See* note 7 *supra* (describing the grievances initiated both before and after the district court proceedings).

SUMMARY OF ARGUMENT

Because Congress has never mandated exhaustion of administrative remedies in *Bivens* cases, the Tenth Circuit's exhaustion requirement must stand or fall based on this Court's independent assessment of the relevant policy considerations. Such an assessment, drawing on the principles recognized in numerous prior cases, can lead to only one conclusion: requiring exhaustion of the BOP grievance procedure in all pure *Bivens* cases brought by federal prisoners would make no sense.

1. To begin with, for plaintiffs like petitioner who seek only damages for past constitutional violations, the BOP process is not an administrative "remedy" at all. That process was designed to achieve the expeditious, prospective resolution of routine inmate complaints. But, because it offers no form of compensation for past injuries, the BOP grievance procedure is inherently inadequate as a remedy for claimants seeking damages, and therefore cannot be a basis for delaying their access to court. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75 (1963).

Indeed, far from offering an alternate remedy, the grievance system, if made mandatory in all *Bivens* cases, would be transformed into a trap for unwary inmates seeking to vindicate their constitutional rights. Such inmates, to avoid forfeiting their constitutional claims, would have to initiate an administrative action almost immediately and pursue three inevitably futile levels of review within very short time deadlines. The courts, in turn, would ultimately be called on to resolve a host of complex issues involving whether inmates did or did not properly exhaust the grievance process.

Finally, we note that there is an incongruity between the typical *Bivens* suit and this supposed alternate rem-

edy. *Bivens* cases—where the defendants are federal employees in their individual capacities—serve a distinctive deterrence function. *See Carlson v. Green*, 446 U.S. 14, 20-21 (1980). Yet in the BOP grievance process, alleged individual wrongdoers play no formal role at all. Conversely, where the alleged wrongdoer is the warden, who is required to handle the grievance at the first level, there is a built-in conflict of interest.

2. The policy arguments for exhaustion advanced by respondents do not withstand scrutiny. The BOP process, by its very nature, cannot "develop" the facts in any meaningful way that will facilitate handling of a subsequent *Bivens* suit. Nor is there any reason to suppose that requiring prior resort to the BOP procedure will significantly lessen the number of pure damages cases ultimately filed in court.

Ultimately, respondents' main point seems to be that the courts should embrace any available procedure that can erect a barrier to prisoner suits, regardless of how futile and unfair it may be. The Court should reject this invitation. If there is a need for an administrative stage in the consideration of federal prisoners' *Bivens* claims, Congress is fully capable of creating a suitable procedure.

ARGUMENT

A rule requiring federal prisoners to exhaust the BOP grievance procedure before seeking damages in *Bivens* suits, whatever its superficial appeal, ultimately would be indefensible. The grievance procedure was designed to serve an entirely different function. To engraft it onto all *Bivens* cases would be to condition the enforcement of constitutional rights on completion of an elaborate series of preliminary procedures that (1) cannot provide the relief sought and (2) serve no other legitimate purpose.[9]

I. FOR CLAIMANTS SEEKING ONLY DAMAGES, THE GRIEVANCE PROCEDURE IS NOT A "REMEDY" AT ALL.

The only basis for imposing an exhaustion requirement here would be an independent judicial assessment of the value of the BOP grievance process as a preliminary "remedy" in *Bivens* cases. Congress has neither man-

[9] Although petitioner is now back in state custody, *see* note 2 *supra*, and the grievance procedure is applicable only to persons in federal custody, 28 C.F.R. § 542.10, there remains a live controversy in this case. There is a serious question whether, without relief from this Court, petitioner could now refile his complaint in the district court and claim an exemption from exhaustion rules based on the fact that he is out of federal custody. As discussed in note 7 *supra*, after petitioner's original complaint was dismissed, he initiated but failed to complete the BOP grievance process in timely fashion. At that point, if exhaustion was in fact required, his *Bivens* claim was arguably forfeited. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-23 (1988) (forfeiture through failure to appeal erroneous administrative black-lung ruling); *Maulick v. Central Classification Bd.*, 659 F. Supp. 24, 27 (E.D. Va. 1986) (forfeiture of Section 1983 claim due to failure to complete state grievance process that had been approved under 42 U.S.C. § 1997e). In sum, the only way that petitioner's rights can be protected is for this Court to rule that his *Bivens* claim was *not* forfeited when he failed to complete exhaustion, either (1) because exhaustion is not required at all in pure damages cases or (2) because petitioner's previously barred claim was revived when he left federal custody.

dated the creation of a BOP grievance system nor directed that the existing system be exhausted in *Bivens* cases.[10] Moreover, as we discuss *infra*, the BOP never intended the grievance system to be more than an informal process for handling routine complaints, largely unrelated to the adjudication of legal claims. Thus, the Court is here being invited to create a new exhaustion requirement on its own initiative, borrowing an administrative remedy that happens to be available. However, because that grievance process offers no remedy at all to a claimant who seeks only compensation for past injuries, this invitation clearly must be rejected.

A. The Grievance Procedure is Inherently Inadequate.

The policies underlying the exhaustion doctrine are well established. By requiring a potential litigant to seek relief through administrative channels before taking his grievance to court, the doctrine preserves the proper role of specialized administrative agencies and benefits the court system as well. The agency is accorded a full opportunity to consider those matters within its purview and, where its own prior conduct is at issue, to correct its own errors. *See, e.g., Bowen v. City of New York*, 476 U.S. 467, 484-85 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). At the same time, the courts benefit because many disputes are resolved administratively

[10] The only statutory basis cited by the BOP when it promulgated the procedure was a collection of general statutes delegating authority over the federal prison system. *See* 28 C.F.R. § 542.10 (citing, as authority, 18 U.S.C. §§ 4001, 4042, 4081-82, 5015, 5039 and 28 U.S.C. § 509). Even Section 4001(b)(1), which vests the "control and management of Federal penal and correctional institutions" in the Attorney General and authorizes him to "promulgate rules for the government thereof," provides no basis for inferring that Congress intended (or even foresaw) the development of an administrative remedy procedure. *Compare* 18 U.S.C. § 4126(c)(4) (specifically authorizing Attorney General to promulgate rules for payment of compensation from Prison Industries Fund to inmates injured while working in federal prison industries).

and, even when litigation remains necessary, the agency will have already developed a factual record and applied its specialized expertise. *See, e.g., Salfi*, 422 U.S. at 765; *McKart v. United States*, 395 U.S. 185, 195 (1969).

All of these policies, however, presuppose an administrative procedure that is adequate to the task at hand. "[I]t is elementary that the exhaustion [doctrine] contemplates an efficacious administrative remedy." *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978) (footnote and internal quotes omitted). Thus, exhaustion is required only when the agency is prepared to consider the grievance fairly and expeditiously, and provide the relief sought if appropriate. *See, e.g., Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561, 587 (1989) ("Administrative remedies that are inadequate need not be exhausted."); *McNeese v. Board of Educ.*, 373 U.S. 668, 674-75 (1963) ("[I]t is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights."). Where these criteria are not met, the agency cannot claim that it deserves the opportunity to hear the grievance first, and the courts are unlikely to benefit from exhaustion because few cases will be resolved short of litigation and the administrative record will be inadequate, irrelevant, or both.

This is just such a case. Characterization of the BOP grievance procedure as a "remedy" relating to petitioner's constitutional claim is simply a misnomer. The regulations expressly exclude any consideration of "tort claims," 28 C.F.R. § 542.12, and, while the precise scope of this exclusion is unclear, it reflects at a minimum the undisputed fact that the grievance procedure offers no form of compensation for past injuries. In sum, petitioner had no chance of winning the relief he was directed to seek in the grievance process.

The inadequacy of the BOP remedy is not surprising in light of its origin and structure. First promulgated in the Code of Federal Regulations in 1979, the current grievance procedure replaced a less detailed but essentially identical scheme adopted in 1974. *See* Bureau of Prisons Policy Statement 2001.6A (Nov. 1, 1974), *reprinted in Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 714-16 (1977). There is no indication that either grievance process was ever intended as anything more than an informal complaint mechanism unrelated to the adjudication of legal rights. In fact, in 1974 the BOP expressly told inmates that they need not exhaust prior to filing suit. *Id.* at 714 ("An offender may, if he chooses . . . file his law suit directly with the appropriate court."). And nothing done or said in 1979 suggests a different view. *See* 28 C.F.R. § 542.10 *et seq.* (1990); 44 Fed. Reg. 62,248 (Oct. 29, 1979).

As one would expect of an informal complaint process, the BOP procedure provides neither for formal findings of fact nor for the application of particular laws or rules. Instead, it constitutes a structured "dialogue" between inmates and administrators. The inmate submits a grievance, receives a response from the warden, and can appeal if he is not satisfied with the response. The appeals, in turn, involve further submissions of the grievance and responses from the regional and central offices of the BOP. While such a grievance process may be desirable as a matter of prison administration, it is equally clear that the only relief that can, or should, emerge from such a process is voluntary, prospective changes in prison administration.

As the cases cited above demonstrate, in any other context it would be considered absurd to suggest that a potential litigant must exhaust a remedy that cannot provide any meaningful relief. Here, we are dealing with *three* levels of totally futile administrative review,[11] each of which would have to be exhausted in every case where the inmate seeks only monetary compensation.[12] Predictably, when the shoe was on the other foot—*i.e.*, when the Attorney General was directed to set minimum standards that *state* prison grievance procedures must meet to qualify for mandatory exhaustion under the Civil Rights for Institutionalized Persons Act, 42 U.S.C. § 1997e—those standards included a requirement that state procedures "afford a successful grievant a meaningful remedy." 28 C.F.R. § 40.6.[13] It is hard to see why a different rule should apply here.

[11] While the BOP officials might conclude that the conduct at issue was inappropriate as a matter of policy, they would have no reason to address its constitutionality. *See* J.A. 17 (ruling below) (" 'this administrative consideration is not to resolve constitutional issues' ") (quoting *Brice v. Day*, 604 F.2d 664, 667 (10th Cir. 1979), *cert. denied*, 444 U.S. 1086 (1980)). Thus, a claimant could not hope to win even a declaratory judgment with respect to the merits of his prospective *Bivens* claim.

[12] An additional complication is created by the fact that an inmate seeking to join a *Bivens* claim with a claim against the United States under the Federal Tort Claims Act would have to exhaust two quite different administrative remedies simultaneously. Under the FTCA procedure, the claim is filed with the BOP regional office, there is an investigation by the warden's designee, and a single determination is issued by the BOP Regional or General Counsel within six months. *See* 28 C.F.R. § 543.31.

[13] We note that the BOP procedure also omits two features that were specifically mandated by Congress for state systems qualifying for mandatory exhaustion—"an advisory role for employees and inmates . . . in the formulation, implementation, and operation of the system" and "safeguards to avoid reprisals." *See* 42 U.S.C. § 1997e(b)(2). Thus, the ruling below creates the anomaly that federal prisoners are forced to exhaust under circumstances where state prisoners could go straight to court under 42 U.S.C. § 1983.

B. Exhaustion Would Create Inordinate Burdens and Risks.

The inevitable futility of the grievance procedure is not its only flaw as a mandatory alternate "remedy" for those seeking to bring *Bivens* claims. The multiple layers of review in the regulations—obviously intended as a protection for inmates—would become a series of hurdles, each of which must be jumped in timely fashion in order to preserve the inmate's right to bring a later *Bivens* action. *Cf. Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-23 (1988); *Heckler v. Ringer*, 466 U.S. 602, 617-19 (1984).

Thus, the regulations require the inmate, after attempting informal resolution of the grievance through "local procedures," to file a grievance within 15 days of the incident. If the inmate is dissatisfied with the warden's response, he has 20 days in which to file an appeal with the BOP Regional Director. If the response is again unsatisfactory, the inmate has 30 days in which to appeal to the BOP Office of General Counsel.

These time limits—although suitable for an informal grievance process—become traps for the unwary if timely and complete exhaustion of that process becomes a mandatory predicate for a lawsuit. In effect, an inmate must decide almost instantly that he wants to bring a *Bivens* suit challenging a particular incident, since he must complete informal resolution efforts in time to file a formal grievance within 15 days of the incident. And he must be sure not to miss the deadlines for the two appeals that are inevitable if the only relief he seeks is damages.[14] Ironically, under the Government's theory, an inmate who completes the administrative process successfully then

[14] *See Maulick v. Central Classification Bd.*, 659 F. Supp. at 27 (dismissing state prisoner's § 1983 claims where prisoner failed to pursue grievance through all levels of CRIPA-qualified grievance procedure).

may have several years (depending on the applicable statute of limitations) in which to proceed to court. Obviously, this is not a rationally designed system.

The grievance procedure, if made mandatory for *Bivens* claimants, would also require federal courts to consider new and complex issues.[15] For example, each of the inmate filing deadlines in the regulations may be extended by the BOP for an unspecified "valid reason." 28 C.F.R. §§ 542.13(b), .15. If the inmate has sought an extension and been denied, the court may be forced to decide whether his failure to make a timely filing should be excused. *Cf. Greene v. Meese*, 875 F.2d 639, 641 (7th Cir. 1989). Similarly, the regulations provide that an inmate may file a grievance first with the Regional Director if he believes that "the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution." 28 C.F.R. § 542.13(c). The Regional Director, however, may decline to accept the complaint if he disagrees with this assessment. *Id.* Here again, courts may become embroiled in disputes about where a complaint should have been initiated.

These problems, of course, are a direct result of borrowing a grievance procedure that was intended for a purpose unrelated to *Bivens* litigation. If Congress set out to design a prior administrative remedy for *Bivens* cases, there is every reason to believe it would look quite different. In the absence of legislation, it makes no sense to instruct inmates that the enforcement of their constitutional rights depends on full exhaustion of a patently unsuitable process.

[15] *See Patsy v. Board of Regents*, 457 U.S. 496, 513-15 (1982) (cataloguing issues that can arise when courts create exhaustion requirements); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harv. L. Rev. 610, 645 (1979) (arguing that exhaustion requirement in prisoner suits "would not necessarily . . . conserve judicial resources" since "each case would involve new issues—the availability and adequacy of the . . . remedies and whether the plaintiff's actions amount to exhaustion").

C. An Appropriate Administrative "Remedy" Would Require Different Parties and Different Decisionmakers.

We note, finally, that characterizing the grievance procedure as a potential "remedy" for petitioner would be inappropriate even if the procedure were modified to allow for damage awards—for reasons having to do with the identity of the participants in that process. The only participants are (1) the inmate and (2) the warden and his superiors, who all speak for the Government. Since there are no hearings, there are no witnesses. This means that in most cases, the potential individual *Bivens* defendants have no formal role in the process.

It is well established, however, that regardless of whatever relief a claimant may be able to obtain from the government for a constitutional violation, a *Bivens* action against the individual wrongdoer serves an independent deterrence function. *See Carlson v. Green*, 446 U.S. 14, 20-21 (1980); 28 U.S.C. § 2679(b)(2)(B) (preserving *Bivens* claims from FTCA preemption). In view of this distinction it would make no sense to require a *Bivens* claimant to exhaust a grievance procedure where, in the usual case, he cannot even make the potential individual defendants show up and answer personally for their actions.[16]

---

[16] The United States is not here arguing in favor of the Fifth Circuit's rule requiring plaintiffs asserting only *Bivens* claims to exhaust the separate FTCA administrative procedure in 28 C.F.R. §§ 543.30-.32 (1990), where limited damages are available. *See Hessbrook v. Lennon*, 777 F.2d 999 (5th Cir. 1985). We note, in any event, that the Fifth Circuit's rule would be equally subject to the criticism that it mandates exhaustion of a procedure with the wrong "defendant." More fundamentally, the FTCA administrative procedure is expressly limited to "claims asserted under the Federal Tort Claims Act," 28 C.F.R. § 543.30, and the FTCA does not even cover all the constitutional claims that may be asserted under *Bivens*, *see Carlson v. Green*, 446 U.S. at 23.

Conversely, in some cases, the potential *Bivens* defendant will be the very person—the warden—required to consider the grievance at the first stage. *See* 28 C.F.R. § 542.11(a)(4). Here, the problem is the inevitable conflict of interest that arises when the potential defendant is also the decisionmaker speaking for the BOP. In other contexts, this Court has cited such conflicts as a reason why an administrative procedure is too inadequate to justify mandatory exhaustion. *See Felder v. Casey*, 487 U.S. 131, 149 (1988) ("While the exhaustion required by Wisconsin's notice-of-claim statute does not involve lengthy or expensive administrative proceedings, it forces injured persons to seek satisfaction from those alleged to have caused the injury in the first place."); *Coit Independence Joint Venture v. FSLIC*, 489 U.S. at 587 (problems with FSLIC administrative procedure are exacerbated by fact that FSLIC is often the main competing creditor and thus has incentives to delay relief to claimant). This principle is equally applicable here.

II. THE OTHER POLICIES SUGGESTED BY RESPONDENTS DO NOT JUSTIFY AN EXHAUSTION REQUIREMENT.

Despite the obvious futility and burdens of the grievance process, respondents have suggested that other policies argue in favor of requiring exhaustion before the filing of *Bivens* cases. In particular, they suggest that the grievance process may serve to develop the relevant facts, resolve some disputes before they go to court, and preserve the integrity of the BOP procedure. These arguments are clearly unavailing.

To begin with, we know of no authority for the proposition that a potential plaintiff may be required to exhaust an inherently futile or inadequate administrative process merely because such exhaustion could illuminate the relevant facts or cut down on the number of suits ultimately filed. Exhaustion is an appropriate requirement only

where the administrative process provides an adequate remedy so that the plaintiff has a realistic prospect of winning some measure of relief.

In any event, the alternative policies asserted here are largely illusory. The Tenth Circuit's primary rationale—that the BOP "administrative record" will allow a court "to determine whether appellant has a possible *Bivens* cause of action" in a given case, J.A. 19, is frankly baffling.[17] As already noted, the grievance procedure consists entirely of a series of written complaints by the inmate and responses by prison administrators. There is no provision for a hearing or findings of fact that could facilitate the disposition of a later court action. To the contrary, with or without exhaustion, the court could only rule on the merits of a *Bivens* claim after evidence is presented in the usual adversarial fashion—by affidavits in support of a summary judgment motion or through testimony at a hearing.[18]

It is true that administrators may be prodded by a grievance to investigate the relevant circumstances. But this opportunity is entirely one-sided; the inmate has no right to formal or informal "discovery" and is given only the information that the administrators choose to put in

[17] So, too, is the court of appeals' suggestion that " 'a record would have aided a court in . . . determining the *extent* of the damages.' " J.A. 18 (quoting *Goar v. Civiletti*, 688 F.2d 27, 29 (6th Cir. 1982)) (emphasis in original).

[18] In many exhaustion cases, courts have pointed to the desirability of allowing administrative agencies to apply their special expertise to a problem before it goes to court. *See, e.g., Weinberger v. Salfi*, 422 U.S. at 765. Here, however, this consideration is largely irrelevant since (1) analysis of the factual circumstances underlying a constitutional damages claim does not usually require specialized knowledge and (2) administrators in the grievance process do not even attempt to apply legal standards to the facts as they understand them. *Cf. Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures . . . .").

their written responses. More importantly, it is unclear why the opportunity for such an investigation should be, in effect, mandated prior to the initiation of a *Bivens* action. The defendants in a *Bivens* suit, after all, are individual alleged wrongdoers. They will generally have personal knowledge of their own conduct and their presentation of a defense will not be materially aided by a prior administrative investigation. At the same time, if prison administrators, for their own purposes, see a need to investigate a particular incident, they are free to do so at any time, regardless of any exhaustion requirements.

Respondents, unlike the Tenth Circuit, also argue that prior resort to the grievance procedure should be required because it may serve to resolve some disputes prior to the initiation of litigation. Br. in Opp. 7. This argument, of course, flies in the face of the acknowledged fact that the grievance procedure cannot provide the sole relief sought in a *Biven* damages action—*i.e.*, damages. Nevertheless, respondents suggest that, in some cases, the grievance process will persuade inmates not to proceed to court because it will provide them prospective relief. Here, for example, relying on the fact that petitioner's medical problems have been chronic, respondents suggest that petitioner is really challenging a "continuing prison practice," *id.* at 10, and might therefore be satisfied with some reforms won through the grievance process.[19]

While such a scenario cannot be ruled out, this possibility does not constitute a valid reason for requiring

[19] Respondents also contend that the grievance procedure may "filter[] out frivolous . . . disputes." Br. in Opp. 7. But it is not clear what this means, since the inmate is not bound by anything determined in the grievance process and the court could not rely on the BOP's conclusion that a claim is frivolous. It may be that in some small number of cases, the BOP's response to a grievance would convince the inmate that his claim is meritless. But in those few cases, absent exhaustion, plaintiffs would presumably be convinced to withdraw their *Bivens* claims as soon as the complaints were answered.

exhaustion. First, it bears emphasis that we are dealing here with plaintiffs who seek only compensatory relief. It may be, as some courts have held, that there is a legitimate basis for requiring exhaustion of the grievance procedure by claimants seeking prospective relief.[20] Where, by contrast, inmates deliberately forgo the option of seeking prospective equitable relief, it seems reasonable to presume that they will not be satisfied with voluntary prospective relief won in the grievance process. Indeed, in the usual case, a *Bivens* claim will involve a specific past incident—such as a beating or, as here, a particular failure to provide needed medical care—and thus prospective relief will be inherently irrelevant.

It may be that respondents intend to propose a rule that would require exhaustion by potential *Bivens* plaintiffs only in some circumstances—*i.e.*, when the underlying facts appear to suggest a continuing grievance. If so, however, they are departing from the rationale of the decision below, which neither focused on the possibility of prospective relief nor was limited to some subset of cases. Moreover, such a rule would be manifestly im-

[20] *See, e.g., Davis v. Keohane*, 835 F.2d 1147, 1148 (6th Cir. 1987); *Veteto v. Miller*, 794 F.2d 98, 99-100 (3d Cir. 1986). As these courts have recognized, the considerations relevant to the exhaustion question are quite different when an inmate seeks prospective equitable relief. *See Goar v. Civiletti*, 688 F.2d 27, 29 (6th Cir. 1982). In such a case, the grievance procedure is quite capable of producing the relief sought—*i.e.*, the termination of ongoing, objectionable conduct by prison officials or employees—and it does not matter that the process fails to address the legality of such conduct directly. Moreover, the short time deadlines in the BOP process are less of a concern in an injunctive case because, if an inmate misses a deadline, he can file a new complaint addressed to an ongoing problem. We note, however, that under Section 1983, claimants seeking injunctive relief, like those seeking damages, generally are not required to exhaust state administrative remedies. *See Patsy v. Board of Regents*, 457 U.S. at 498 (complaint sought injunction as well as damages).

possible to administer, since it would require an individualized determination concerning which *Bivens* claims arise from continuing problems as opposed to isolated incidents. *See McCarthy v. Bronson*, 111 S. Ct. 1737, 1742 (1991) ("[T]he distinction between cases challenging ongoing [prison] conditions and those challenging specific [past] acts of alleged misconduct will often be difficult to identify.").

It makes far more sense to allow inmates with potential constitutional claims, like any other plaintiffs, to decide for themselves the nature of their claim. Exhaustion requirements would then turn on whether the complaint seeks purely compensatory relief or includes a claim for prospective equitable relief as well.

Finally, respondents seem to argue that it would be inappropriate to allow inmates to "bypass" *any* "established procedure[]," Br. in Opp. 7, even asserting that it would "undermine prison discipline" to allow inmates to go directly to court, *id.* at 5.[21] Ultimately, the suggestion seems to be that the courts not ignore any barrier to lawsuits by inmates that can be erected on the basis of any administrative procedure found in the Code of Federal Regulations—however inadequate and futile that procedure may be. Such a suggestion, far from articulating a valid policy basis for requiring exhaustion, merely reflects antipathy to the proposition that prisoners, like all others who are deprived of constitutional rights under color of federal law, should have a plain and speedy remedy. *Cf. Felder v. Casey*, 487 U.S. at 149-50 (rule designed to protect state officials by limiting claimants'

[21] We note that, absent an exhaustion requirement, the grievance procedure will hardly become a dead letter. The vast majority of inmate grievances presumably have nothing to do with constitutional claims that are ultimately asserted in court. Even when there is some overlap, inmates are likely to present their problems with particular employees to prison administrators through the grievance process while also seeking compensation through a court action.

access to court is plainly inconsistent with the central objectives underlying section 1983).[22]

In any event, if there is some reason for concern about prisoners taking their grievances directly to court, Congress is free to create a procedure that offers inmates the chance to win the compensation they currently seek through *Bivens* actions. Such a procedure, if optional, might commend itself to inmates as a better alternative than litigation. It might also be made mandatory, along the lines of the CRIPA system for state prisoners. But Congress simply has not, so far, taken this step.

[22] While some judges and commentators have expressed concern over the number of prisoner lawsuits in the federal courts, that concern simply does not warrant the imposition of an exhaustion requirement in *Bivens* actions. To begin with, the vast majority of prisoner civil-rights actions in the federal courts are brought by *state* prisoners under 42 U.S.C. § 1983. *See* 1990 Annual Report of the Director of the Administrative Office of the United States Courts, App. I, at 33 (Table C2) (of 25,992 prisoner civil-rights actions commenced in the federal courts between July 1, 1989 and June 30, 1990, a total of 24,843—or 95.6%—were brought by state prisoners); *see also* Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. § 1997e*, 104 Harv. L. Rev. 1309, 1313 n.26 (1991). Moreover, of the 1,149 civil rights actions brought by federal prisoners in that period, the Administrative Office's statistics do not indicate what fraction advanced *only* a damages claim under *Bivens*, as opposed to a claim for declaratory or injunctive relief. *See* Note, 104 Harv. L. Rev. at 1313 n.26. Finally, the burden imposed by a prisoner lawsuit on federal judicial resources should not be overestimated. As this Court observed not long ago, "the vast majority of prisoner cases are resolved on the complaint alone." *Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

DEPARTMENT OF JUSTICE, BUREAU OF PRISONS: ADMINISTRATIVE REMEDY PROCEDURE FOR INMATES
28 C.F.R. § 542.10 *et seq.*

§ 542.10 Purpose and scope.

The Bureau of Prisons has established an Administrative Remedy Procedure through which an inmate may seek formal review of a complaint which relates to any aspect of his imprisonment if less formal procedures have not resolved the matter. This procedure applies to all inmates confined in Bureau of Prisons institutions, but does not apply to inmates confined in non-federal facilities.

§ 542.11 Responsibility.

(a) The Warden, Regional Director, and General Counsel are responsible for the operation of the Administrative Remedy Procedure at the institution, regional and central office levels, respectively, and shall:

(1) Establish procedures for receiving, reviewing, investigating and responding to complaints or appeals submitted by an inmate;

(2) Acknowledge receipt of a complaint or appeal by returning to the inmate a signed receipt;

(3) Conduct an investigation into each complaint or appeal;

(4) Respond to and sign all complaints or appeals filed at their level. This responsibility may not be delegated further.

(b) Inmates have the responsibility to present complaints in good faith and in an honest and straightforward manner.

§ 542.12 Issues improperly filed.

Filings will not be accepted under the Administrative Remedy Procedure for tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates.

§ 542.13 Initial filing.

(a) *Informal resolution.* Inmates shall informally present their complaints to staff, and staff shall attempt to informally resolve any issue before an inmate files a request for Administrative Remedy. The Warden may establish local procedures to ensure that attempts at informal resolution are made.

(b) *Filing.* If an inmate is unable to informally resolve his complaint, he may file a formal written complaint, on the appropriate form, within fifteen (15) calendar days of the date on which the basis of the complaint occurred. Where the inmate demonstrates a valid reason for delay, an extension in filing time shall be allowed. An extension in the time for filing shall be allowed when an inmate indicates and staff verify that a response to the inmate's request for copies of dispositions requested under section 8 of this Program Statement (§ 542.16) has not been received. An inmate may obtain assistance in preparation of his complaint or appeal from other inmates or from institution staff.

(c) *Sensitive complaints.* If the inmate believes the complaint is sensitive and that he would be adversely affected if the complaint became known at the institution, he may file the complaint directly with the Regional Director. The inmate must explain, in writing, the reason for not filing the complaint at the institution. If the Regional Director agrees that the complaint is sensitive, he shall accept and respond to the complaint. If the Regional Director does not agree that the complaint is sensitive, he shall advise the inmate in writing of that determination, without a return of the complaint. The inmate may pursue the matter by filing the complaint locally with the Warden.

(d) *Control Unit Appeals.* Appeals relative to Control Unit placement may be filed directly with the General Counsel.

[44 FR 62250, Oct. 29, 1979, as amended at 44 FR 76726, Dec. 27, 1979]

§ 542.14 Remedy processing.

Response time limits. A complaint or appeal is considered filed when the receipt is issued. Once filed, response shall be made by the Warden within fifteen (15) calendar days, by the Regional Director within thirty (30) calendar days, and by the General Counsel within thirty (30) calendar days. If the complaint is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond within 48 hours of receipt of the complaint. If the period of time for response to a complaint or appeal is insufficient to make an appropriate decision, the time for response may be extended once by the same amount of time as originally allowed for response. Staff shall inform the inmate of this extension in writing. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level. Staff shall, however, respond to all filed complaints.

§ 542.15 Appeals.

Filing. If an inmate is not satisfied with the Warden's response, that response may be appealed on the appropriate form to the Regional Director within twenty (20) calendar days of the date of the Warden's response. If the inmate is not satisfied with the Regional Director's response, that response may be appealed on the appropriate form to the General Counsel within thirty (30)

calendar days from the date of the Regional Director's response. Where a valid reason for delay is stated by an inmate these time limits may be extended. Appeal to the Office of General Counsel is the final administrative appeal in the Bureau of Prisons.

§ 542.16 Index and access.

Disposition access. Inmates and members of the public may request access to Administrative Remedy indexes and to responses by case number at the location where they are retained. Copies, with names and other identifiers deleted, may be inspected during regular office hours or may be purchased.

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No. 90-6861

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN J. MCCARTHY, PETITIONER

v.

MR. MADDIGAN, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether petitioner must exhaust the Bureau of Prisons' administrative grievance procedure before filing an action for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The decision of the court of appeals (J.A. 16-19) is reported at 914 F.2d 1411. The orders of the district court (J.A. 12-13 and 14-15) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 20, 1990. The petition for a writ of certiorari was granted on April 22, 1991. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Bureau of Prisons administrative remedy procedure for inmates, codified at 28 C.F.R. 542.10 *et seq.*, is reprinted in the Appendix to Petitioner's Brief at 1a-4a.

18 U.S.C. 4001(b) provides:

> (1) The control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof, and appoint all necessary officers and employees in accordance with the civil-service laws, the Classification Act, as amended, and the applicable regulations.
>
> (2) The Attorney General may establish and conduct industries, farms, and other activities and classify the inmates; and provide for their proper government, discipline, treatment, care, rehabilitation, and reformation.

18 U.S.C. 4042 provides, in pertinent part:

> Duties of Bureau of Prisons
>
> The Bureau of Prisons, under the direction of the Attorney General, shall—
>
> (1) have charge of the management and regulation of all Federal penal and correctional institutions;
>
> (2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;
>
> (3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States;
>
> * * * * *

STATEMENT

1. The question in this case is whether inmates of federal correctional facilities must comply with the Bureau of Prisons' internal grievance procedures before initiating a lawsuit against prison officials for money damages under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Congress has authorized the Attorney General, under 18 U.S.C. 4001(b) and 4042, to provide for the management and regulation of the penal institutions within the federal prison system, and for the protection and discipline of the system's inmates. The Attorney General has delegated that authority to the Bureau of Prisons, see 28 C.F.R. 0.96(q), which has promulgated a four-stage procedure for formal review of prisoner grievances "relat[ing] to any aspect of * * * imprisonment."[1] 28 C.F.R. 542.10. See 28 C.F.R. 542.10 *et seq.*

[1] The BOP grievance regulations state that they do not apply to complaints involving "tort claims, Inmate Accident Compensation claims, Freedom of Information or Privacy Act requests, or complaints on behalf of other inmates." 28 C.F.R. 542.12. The BOP has construed the exemption for "tort claims" to refer to Federal Tort Claims Act (FTCA) claims, for which there is an alternative set of administrative procedures, not to *Bivens* claims, for which there is not. That interpretation is consistent with the administrative record, which makes clear that Section 542.12 was intended to exempt claims already covered by other regulations. The original proposed rules included an exemption for "claims under the Federal Tort Claims Act or the Claims for Inmate Injury Compensation under 18 U.S.C. 4126." See 42 Fed. Reg. 64,083 (1977); see also 28 C.F.R. 546.20 to 546.21 (regulations cover-

The grievance procedure applicable to this case, which has been in effect since 1979, see 44 Fed. Reg. 62,248 (1979), is structured to encourage the prompt investigation and resolution of prisoner grievances. Under BOP regulations, any inmate at a federal facility with a complaint relating to any aspect of his imprisonment must first raise his complaint informally with members of the prison staff, 28 C.F.R. 542.13(a), who must attempt to resolve the complaint. If an inmate is dissatisfied with the staff's response and wishes to pursue the issue further, a written complaint must be filed within 15 days of the date "on which the basis of the complaint occurred." The regulations provide, however, that an untimely filed complaint "shall" be accepted if the inmate has a "valid reason" for delay. Section 542.13(b). The regulations do not include any technical pleading requirements, and an inmate may obtain assistance from the prison staff or other inmates in preparing his complaint or appeal. Section 542.13(b). The regulations also provide for the confidential filing of "sensitive" complaints directly with the Regional Director, subject to the Director's consent. Section 542.13(c).

The filing of the inmate's written complaint triggers investigation and review of the grievance. First, the warden of the facility in which the prisoner is incarcerated is required to conduct an investigation into each complaint, Section 542.11(a)(3), and

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ing Inmate Injury Compensation); 28 C.F.R. 543.30 to 543.32 and 14.1 *et seq.* (regulations covering FTCA claims). In the final rule, exemptions were added for Freedom of Information Act and Privacy Act claims, because those claims "may be filed in accordance with Part 16 of 28 CFR." 44 Fed. Reg. 62,248 (1979).

must respond to the inmate within 15 days. Section 542.14.[2] If the inmate is not satisfied with the relief afforded, he then has 20 days to appeal to the Regional Director. The Regional Director is then required to conduct a second, independent investigation of the grievance. Section 542.11(a)(3). This investigation and response must be completed within 30 days. Section 542.15. If further review is still required, the inmate has 30 days within which to file an appeal to the General Counsel of the Bureau of Prisons. A third investigation must then be conducted by the General Counsel, culminating in a final response within 30 days. Sections 542.11(a)(3), 542.15. In the ordinary course, the grievance procedure will be completed in less than five months.[3]

The BOP provides the inmate with a copy of the administrative record, and encourages inmates to file the record with the court if judicial review is sought. Although BOP has not asserted that its findings are entitled to judicial deference or that collateral estoppel should apply, BOP has determined that the grievance system cannot effectively serve its intended

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[2] Federal Prison System Program Statement No. 1330.7 (Oct. 12, 1979) sets forth additional requirements: "complaints of staff misconduct should not be investigated by the staff member complained about"; responses to complaints must "be in writing"; and "the response should answer completely the complaint, be factual, but should contain no extraneous information." The regulations also provide for accelerated processing of "emergency" complaints, see 28 C.F.R. 542.14.

[3] The time allotted for an administrative response at each level can be doubled if the inmate is notified in writing. Section 542.14. A failure to answer the inmate's complaint within the time allotted is deemed to be "a denial at that level." Section 542.14.

function unless inmates are required to exhaust the administrative process before filing claims for equitable or monetary relief in federal court. The government, on behalf of *Bivens* defendants, has accordingly requested courts to dismiss claims brought by inmates who have bypassed the grievance procedure.[4]

2. Petitioner was sentenced in Connecticut on state criminal charges of burglary and larceny, and was incarcerated in the federal penitentiary at Leavenworth, Kansas, as a contract prisoner pursuant to

[4] Petitioner errs in suggesting (Pet. 12) that it is not now BOP policy to seek an exhaustion requirement from the courts. The passage on which petitioner relies—a sentence fragment taken out of context—is from a Policy Statement that was promulgated under a previous version of its administrative remedy procedures, before the adoption of the regulations in issue. The relevant section of Bureau of Prisons Policy Statement 2001.6A recites the steps of the administrative grievance and appeals process, and then, in a new paragraph, states that "An offender may, if he chooses, forward his complaint through the Prisoners' Mail Box or he may file his law suit directly with the appropriate court." This statement instructs prisoners on the mechanics of filing at different stages of the process.

The above-quoted excerpt continues: "However, courts frequently require evidence that administrative remedies have been exhausted before ruling on a complaint, and offenders should be so advised." Elsewhere, the Policy Statement says that, "[i]f dissatisfied with the response to his complaint and appeals, the offender is free to file suit in an appropriate court and attach documentary proof that he exhausted his administrative remedy." These comments hardly constitute a repudiation of an administrative exhaustion requirement. In any event, Policy Statement 2001.6A which was promulgated under regulations no longer in force, was superseded in 1979 by a new policy statement that does not contain the quoted passage. See U.S. Dep't of Justice Federal Prison System Program Statement 1330.7 (Oct. 12, 1979).

18 U.S.C. 5003. J.A. 5, 8. Bureau of Prisons records reflect that, on March 26, 1991, petitioner was transferred out of the federal prison at Leavenworth and was returned to the custody of the Connecticut Department of Corrections. See also Pet. Br. 3-4 n.2; Pet. Reply 3. While in custody, petitioner filed numerous *pro se* complaints in courts throughout the country challenging various aspects of his confinement.[5]

[5] See, *e.g.*, *McCarthy* v. *Warden Blevins*, No. TH89-42-C (S.D. Ind.) (filed Mar. 1, 1989) (claiming denial of medical treatment for his back ailment); *McCarthy* v. *Warden Henman*, No. 90-3302-R (D. Kan.) (filed Aug. 10, 1990) (claiming denial of medical treatment for psychiatric stress problems); *McCarthy* v. *Warden Henman*, No. 90-3334-R (D. Kan.) (filed Aug. 21, 1990) (claiming that petitioner was given inadequate medical treatment for his back ailment); *McCarthy* v. *United States Attorney General*, No. 291CV00436PCD (D. Conn.) (filed May 24, 1991) (alleging denial of adequate medical treatment). See also, complaints filed in the United States District Court for the Southern District of Indiana in *McCarthy* v. *Lopez*, No. TH-87-2-C; *McCarthy* v. *Blevins*, No. TH-87-7-C; *McCarthy* v. *Blevins*, No. TH-87-210-C; in the United States District Court for the Middle District of Pennsylvania in *McCarthy* v. *Keohane*, No. 88-1633; *McCarthy* v. *Gonzalez*, No. 88-1756; *McCarthy* v. *Keohane*, No. 88-1775; and *McCarthy* v. *United States*, No. 88-1943; in the United States District Court for the Central District of California in *McCarthy* v. *United States*, No. 89-6051; *McCarthy* v. *Rison*, No. 89-6052; *McCarthy* v. *Morris*, No. 89-6272; *McCarthy* v. *United States*, No. 89-6557; and *McCarthy* v. *United States*, No. 90-6036; and in the United States District Court for the District of Kansas in *McCarthy* v. *Henman*, No. 90-3122-R; *McCarthy* v. *Weider*, No. 90-3141-R; *McCarthy* v. *Henman*, No. 90-3228-R; *McCarthy* v. *Henman*, No. 90-3323-R; *McCarthy* v. *Henman*, No. 90-3334-R; *McCarthy* v. *Henman*, No. 90-3351-R; *McCarthy* v. *Henman*, No. 90-3353-R; *McCarthy* v. *Rison*, No. 91-3083-R; and *McCarthy* v. *Thompson*, No. 91-3141-R.

In the case at issue, petitioner filed suit against four prison employees—the hospital administrator, a psychologist and two physicians. The complaint alleged that the medical staff at Leavenworth violated the Eighth Amendment of the Constitution by exhibiting "deliberate indifference" to his "serious medical needs." [6]

The complaint alleged that several months after undergoing back surgery, petitioner began to experience chronic back pain and requested medication. J.A. 9. Although the complaint concedes that the prison medical staff provided petitioner with medications, he claims that they had an "insignificant" effect on his condition. Petitioner was accordingly "forced to purchase contraband drugs." *Ibid.* The complaint further asserted that petitioner had a "long history" of psychiatric problems related to his inability "to cope with stress," and that the failure of the medical staff to respond to his medical needs was causing "stress and violent reactions." *Id.* at 10. Finally, petitioner complained that the defendants should have transferred him to a single cell because

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[6] Petitioner simultaneously filed two complaints with the district court. One represented that petitioner had "begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to [his] imprisonment" and that petitioner had exhausted administrative remedies for the "facts relating to" his complaint. J.A. 2-3. A second complaint alleging the same facts stated that exhaustion was not required because petitioner was seeking "Money Damage Awards Only." J.A. 8. Both complaints were signed by petitioner on March 28, 1990, and filed on April 3, 1990, and the district court assigned Docket No. 90-3101-R to both. There is no dispute in this case, however, that petitioner did not exhaust the administrative grievance procedure for the claim in issue here. Pet. Br. 5 n.7.

pain-induced insomnia was causing conflict with his cellmate. *Id.* at 9. Based upon the allegations that the defendants "ignored" these requests, petitioner sought $300,000 in actual, compensatory, and punitive damages under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). J.A. 9-10. The complaint did not seek equitable relief.

3. On April 6, 1990, relying on *Brice* v. *Day*, 604 F.2d 664 (10th Cir. 1979), cert. denied, 444 U.S. 1086 (1980), the district court dismissed petitioner's complaint without prejudice because petitioner "failed to demonstrate his use of the administrative remedy provided by the Bureau of Prisons." J.A. 12. On April 16, 1990, petitioner filed a Motion For Relief From Judgment pursuant to Fed. R. Civ. P. 60(b). J.A. 1. The district court denied the motion on April 19, 1990, *id.* at 14-15, and petitioner appealed.

4. On September 20, 1990, the court of appeals upheld the district court's decision, J.A. 16-19. Relying on its prior decision in *Brice* v. *Day*, *supra*, the court ruled that a federal prisoner is required to exhaust administrative remedies before bringing a *Bivens* action, even where the sole relief sought is money damages. The exhaustion rule, the court said, "is not keyed to the type of relief sought, but to the need for preliminary fact-finding." J.A. 18. "*Brice* made clear," the court stated, that "administrative consideration is not to resolve constitutional issues nor to consider damages * * * but simply to develop a factual record to assist the district court in its review." *Id.* at 17.

The court of appeals declined to follow the decisions in *Muhammad* v. *Carlson*, 739 F. 2d 122 (3d Cir. 1984), and *Goar* v. *Civiletti*, 688 F. 2d 27 (6th

Cir. 1982), in which the courts held that a prisoner need not exhaust the Bureau of Prisons' administrative grievance procedures before filing a *Bivens* action for monetary relief. Instead, the court reasoned that because *Bivens* actions are a " 'creation of the judiciary' * * * it follows that courts may, and indeed must, establish reasonable requirements for bringing such actions." J.A. 18. The court endorsed the Fifth Circuit's conclusion in *Hessbrook* v. *Lennon*, 777 F.2d 999, 1007 (1985), that "a broad exhaustion requirement is particularly appropriate in cases involving federal prisoner complaints against prison officials relating to their * * * treatment during confinement." J.A. 18. Although assuming that "the administrative apparatus could not award money damages," [7] the court observed that "administrative consideration of the possibility of corrective action and a record [may aid] a court in measuring liability and determining the *extent* of the damages." *Ibid.* (citing *Goar* v. *Civiletti*, 688 F.2d at 29).

The court noted that petitioner did not challenge the district court's finding that he failed to make use of "the [available] administrative remedy process." J.A. 19. Noting that "preliminary fact-finding is necessary * * * to determine whether [petitioner] has a possible *Bivens* cause of action," the court of appeals affirmed the order of the district court dismissing petitioner's claim without prejudice. *Ibid.*

SUMMARY OF ARGUMENT

A. This Court has recognized that its judicial "power to grant relief that is not expressly authorized by statute" under *Bivens* v. *Six Unknown*

[7] But see discussion, *infra*, at pp. 19-20.

Named Agents of the Federal Bureau of Narcotics, should not be exercised in a manner that will infringe on other substantial governmental interests. *Bush* v. *Lucas*, 462 U.S. 367, 373 (1983). The Court has adopted reasonable limitations on the scope of the *Bivens* remedy where (1) the limitation promotes the effective functioning of the coordinate branches of government; (2) the limitation serves to accommodate articulated congressional policies; and (3) the litigant retains effective rights of redress for constitutional injuries. These considerations support the adoption of an exhaustion rule requiring inmates of federal correctional facilities to utilize the BOP's grievance process before filing judicial actions under *Bivens*.

B. Exhaustion of the BOP's grievance process promotes the effective functioning of the federal correctional system and the courts. The Court has recognized that BOP must be the "primary arbiter[] of what constitutes the best solution" to problems of prison administration. *Turner* v. *Safley*, 482 U.S. 78, 89 (1987). The requirement that inmates first present complaints to BOP gives prison officials the opportunity to consider corrective action before courts intervene. By promoting internal resolution of disputes, exhaustion minimizes the burden of responding to "boundless" prisoner complaints, see *Preiser* v. *Rodriguez*, 411 U.S. 475, 492 (1973), and benefits the court system by reducing the number of claims requiring judicial attention.

Contrary to petitioner's contention, complaints giving rise to pure claims for money damages can often be resolved at the administrative level, because BOP has authority to settle monetary claims before inmates resort to judicial action. Further, by some-

times permitting summary judgment disposition without resort to civil discovery, the administrative record developed in the course of the BOP procedure reduces the "peculiarly disruptive" effects of civil discovery on prison operations, see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817 (1982), and assists the courts in the fair and efficient handling of *Bivens* claims.

C. Exhaustion should be required here "in the light of relevant policy determinations made by the Congress." *Bush* v. *Lucas*, 462 U.S. at 373. Pursuant to 42 U.S.C. 1997e, state prison inmates may be compelled to exhaust prison grievance procedures, regardless of whether those procedures provide for monetary relief, before filing claims against state officials under 42 U.S.C. 1983 for violations of constitutional rights. Section 1997e reflects Congress's judgment that exhaustion of state prisoners' constitutional claims is justified by considerations of policy, including the need to reduce the burden on the courts and to "improve prison conditions." *Patsy* v. *Board of Regents*, 457 U.S. 496, 508 (1982). It would make "no sense" to conclude that exhaustion of federal prisoners' claims does not advance similar policies. *Butz* v. *Economou*, 438 U.S. 478, 500-501 (1978).

D. Exhaustion of BOP grievance procedures does not impair the effectiveness of the *Bivens* remedy. The compensatory and deterrent effects of *Bivens* actions are preserved, since an inmate may obtain *de novo* judicial review and full compensation for meritorious claims, and federal officials are exposed to personal financial liability.

This Court has never ruled that exhaustion can only be required where the relief afforded at the administrative level serves as a complete substitute for

relief subsequently available in court. The nature of the relief that may be obtained at the administrative level is simply one factor considered by the courts in construing Congress's intent under the statutory schemes at issue. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. 561, 586-587 (1989). This Court accordingly has required exhaustion of "inadequate" administrative remedies where necessary to further congressional policies. See, *e.g.*, *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974). Moreover, in determining how to exercise its "power [under *Bivens*] to grant relief that is not expressly authorized by Congress," the Court has held that it should defer to an administrative scheme even where it could "not provide complete relief for the plaintiff." *Bush* v. *Lucas*, 462 U.S. at 373, 388.

ARGUMENT

PETITIONER MUST EXHAUST ADMINISTRATIVE GRIEVANCE PROCEDURES ESTABLISHED BY THE FEDERAL BUREAU OF PRISONS BEFORE FILING A *BIVENS* CLAIM FOR MONEY DAMAGES

A. This Court Can Impose Reasonable Limitations On The Exercise Of Its Power Under *Bivens* In Order To Promote The Effective Functioning Of Government Or To Accommodate Congressional Policy

In *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. at 397, this Court "established that a citizen suffering a compensable injury to a constitutionally protected interest could invoke the general federal question jurisdiction of the district courts to obtain an award of monetary damages against the responsible federal official." *Butz* v. *Economou*, 438 U.S. at 504. This Court has expressly recognized the right to sue federal officers for money damages for violations of

rights under the Fourth Amendment, see *Bivens*, *supra*, the Fifth Amendment, see *Davis* v. *Passman*, 442 U.S. 228 (1979), and the Eighth Amendment, see *Estelle* v. *Gamble*, 429 U.S. 97 (1976). Acknowledging that "*Bivens* actions are a creation of federal law," and that "the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules," *Carlson* v. *Green*, 446 U.S. 14, 23 (1980), the Court has not hesitated to fashion common law guidelines delimiting the federal courts' powers to redress constitutional torts. Accordingly, the Court has developed a body of doctrine concerning types of damages, compensable injuries, the degree of intent required to establish a cause of action, and the availability of immunity defenses.[8]

For example, the Court has held that a *Bivens* action will lie only if "there are available no other alternative forms of judicial relief." *Davis* v. *Passman*, 442 U.S. at 245. A *Bivens* claim is defeated if Congress intended to provide an effective alternative remedy. *Carlson* v. *Green*, 446 U.S. at 18-19; see also *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Even if Congress has not provided such relief, the courts may refuse to entertain a *Bivens* action where "special factors counsel[] hesitation." *Carlson* v. *Green*, 446 U.S. at 18 (citations omitted.) See, *e.g.*, *Bush* v. *Lucas*, 462 U.S. at 388 (comprehensive structure of federal civil service system is "special factor" counseling against "augment[ation] by creation of new judicial remedy"); *Chappell* v. *Wallace*, 462 U.S. 296, 298-305 (1983) ("unique disciplinary structure

[8] See, e.g., Monaghan, *The Supreme Court 1974 Term, Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975) (discussing doctrine governing *Bivens* actions as judge-made common law).

of military establishment" precludes *Bivens* remedy); see also *United States* v. *Stanley*, 483 U.S. 669 (1987). The Court has also modified the scope of the *Bivens* remedy to allow the Executive Branch to function effectively. Mindful of "the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability," *Scheuer* v. *Rhodes*, 416 U.S. 232, 239 (1974), the Court has fashioned immunity doctrine in ways that limit the circumstances under which a plaintiff may recover under *Bivens*. See, *e.g.*, *Harlow* v. *Fitzgerald*, 457 U.S. at 814; *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985). Finally, the Court has held that a *Bivens* remedy for a violation of the Eighth Amendment is unavailable unless defendant prison officials are shown to possess "the requisite culpable state of mind." *Wilson* v. *Seiter*, No. 89-7376 (June 17, 1991), slip op. 2; see also *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986); *Estelle* v. *Gamble*, 429 U.S. at 106.

These decisions establish a fundamental point concerning the Court's proper role in *Bivens* jurisprudence—that the Court will adopt reasonable limitations on its own exercise of "power to grant relief that is not expressly authorized by statute" when necessary to accommodate either the effective functioning of government or articulated congressional policy. See *Bush* v. *Lucas*, 462 U.S. at 373 (declining to exercise its power under *Bivens* in order to accommodate congressional policy under the civil service laws); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982) (precluding *Bivens* remedy in action against the President to prevent unwarranted interference with executive functions); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (expanding the scope of qualified immunity in *Bivens* actions to reduce the disruptive impact of litigation on federal functions). The

Court's imposition of these limitations on the scope of the *Bivens* remedy has been "guided" and "informed" by "concerns of public policy," "federal statutes," and "common law." *Nixon* v. *Fitzgerald*, 457 U.S. at 747.

Application of these principles should lead this Court to conclude that requiring inmates to exhaust the Bureau of Prisons' grievance procedures is a reasonable and appropriate limitation on *Bivens*: exhaustion fosters substantial interests of the courts and the federal system, in conformance with articulated congressional policy, while still enabling inmates to seek vindication for alleged violations of constitutional rights encompassed by *Bivens*.

B. Exhaustion Of The Bureau Of Prisons' Grievance Procedure Is Needed To Promote The Effective Functioning Of The Prisons And The Courts

As this Court has recognized, a party is ordinarily required to exhaust available administrative remedies before seeking relief in federal court. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1983). Courts "may impose [an exhaustion] requirement even where Congress has not expressly so provided" to promote the effective functioning of federal agencies. *Patsy* v. *Board of Regents*, 457 U.S. at 501; see also *Coit Indep. Joint Venture* v. *FSLIC*, 489 U.S. at 583-585 (exhaustion of FSLIC administrative remedies prior to filing suit is appropriate means to carry out FSLIC's statutory responsibility for liquidating the assets of insolvent institutions); *McKart* v. *United States*, 395 U.S. 185, 193-195 (1969); *McGee* v. *United States*, 402 U.S. 479, 483-485 & n.6 (1971).

1. Acting pursuant to its responsibility for the "control and management" of federal penal and correctional institutions, 18 U.S.C. 4001, and the "protection and discipline" of its inmates, 18 U.S.C. 4042,

BOP has established internal grievance procedures, and has also sought imposition of an exhaustion requirement. This position is based upon BOP's determination that, regardless of whether the inmate seeks monetary damages or injunctive relief, exhaustion will promote use of the grievance process, which will, in turn, foster more effective management and better prison conditions. Requiring a prisoner to exhaust administrative remedies before bringing a *Bivens* action provides many benefits associated with prior administrative consideration. See, *e.g.*, *McKart* v. *United States*, 395 U.S. at 193-195; *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1979). Indeed, petitioner does not even appear to contest the fact that exhaustion of all claims advances fundamental interests of prison administration. Pet. Br. 14.

The interests that justify exhaustion under this Court's precedent are plainly well served by applying the doctrine here. First, as this Court has acknowledged, prison authorities are in the best position to investigate and evaluate prisoner complaints in the first instance, and to determine what action should be taken. See *Procunier* v. *Martinez*, 416 U.S. 396, 405 n.9 (1974) (courts are especially "ill suited to act as the front-line agencies for the consideration and resolution of the infinite variety of prisoner complaints."); *Turner* v. *Safley*, 482 U.S. at 89 (prison authorities are "the primary arbiters of what constitutes the best solution" to problems of prison administration and are in the best position to implement such solutions.). With regard to matters—such as the proper response to prisoner grievances—that fall squarely within BOP's expertise, "separation of powers concerns counsel a policy of judicial restraint," *Turner* v. *Safley*, 482 U.S. at 85, and deference to the agency's judgment is in order. See, *e.g.*,

Bell v. *Wolfish*, 441 U.S. 520, 547 n.29 (1979) ("courts should defer to the informed discretion of prison administrators because the realities of running a corrections institution are complex and difficult, the courts are ill equipped to deal with these problems, and the management of these facilities is confided to the Executive and Legislative Branches, not to the Judicial Branch.").[9] Thus, it is entirely appropriate for courts to exercise jurisdiction only after the agency has had the initial opportunity to apply its expertise to problems discovered through the grievance process.

Second, exhaustion of BOP procedures ensures that dangerous conditions or abusive practices will be brought to the attention of responsible officials promptly so that the facts can be investigated and corrective action can be implemented immediately by the agency. The availability of an expeditious process is critical in the volatile setting of a prison.

Third, the opportunity for internal resolution of disputes promotes the potential for effective communication between inmates and the prison staff, and avoids the adversarial frictions engendered by confrontations in the judicial system. In addition, as the court of appeals suggested in *Brice* v. *Day*, 604 F.2d at 666-667, institutional lines of authority over prison staff and inmates are undermined when prisoners are not required to "go through the existing machinery

[9] See also *Turner* v. *Safley*, 482 U.S. at 84-85 ("Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977); *Procunier* v. *Martinez*, 416 U.S. 396 (1974); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Hudson* v. *Palmer*, 468 U.S. 517, 527 (1984).

for investigation and resolution, or recommendation to higher authority," but are permitted an "immediate confrontation with the guards and supervisors outside the prison and in the court room." *Id.* at 667.

Fourth, the opportunity for internal resolution of grievances minimizes the burdens imposed on the prison if it is required to respond to every inmate complaint. These burdens are not insubstantial. As this Court recognized in *Preiser* v. *Rodriquez*, 411 U.S. at 492, the potential for claims against prison officials is "boundless" because, "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State." Contrary to petitioner's suggestion, this consideration is applicable to claims for money damages as well as to those seeking corrective action.

It is reasonable to anticipate that some prisoner complaints seeking money damages may be resolved through the grievance process, thereby obviating the need for judicial intervention. This will occur for a variety of different reasons: an inmate may conclude, based upon facts disclosed in the response to his complaint, that he does not have a basis to seek judicial relief; an inmate may determine that he is satisfied with corrective action taken by prison officials; or the Bureau of Prisons may exercise its authority to pay money damages to the inmate in settlement of his potential claim for relief.

BOP and Justice Department officials are authorized to settle or compromise claims against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346—including administrative claims—by the payment of monetary compensation. See 28 C.F.R. 543.30, 543.31; see also 28 U.S.C. 2672 (authorizing the settlement of tort claims against the

United States); 28 C.F.R. 0.172 (same). According to BOP, the agency has invoked its FTCA settlement authority to pay compensation to prisoners with claims that could be pursued in court under either *Bivens* or the FTCA. See, *e.g.*, *Carlson* v. *Green*, 446 U.S. at 19-20 (*Bivens* and the FTCA provide overlapping and complementary remedies "for the same type of conduct"); see also *Hessbrook* v. *Lennon*, 777 F.2d at 1001. These claims come to the agency's attention through the grievance process before the prisoner has filed a lawsuit and elected the theory under which he will proceed in court.[10] In short, exhaustion of monetary claims can avoid needless litigation.

Finally, even where litigation is not averted, the development of a factual record under BOP procedures minimizes the "peculiarly disruptive" effect of discovery on the agency. *Harlow* v. *Fitzgerald*, 457 U.S. at 817. In *Harlow*, this Court found that the disruptions of civil discovery in *Bivens* actions threaten "effective government." *Ibid.* The Court accordingly expanded the scope of the qualified immunity bar to the *Bivens* remedy so as to "permit the resolution of many insubstantial claims on summary judgment." *Id.* at 818. The *Harlow* considerations have even greater force in the context of this

[10] The Department of Justice (which includes the Bureau of Prisons) also has authority "to settle or compromise a personal damages claim against its employees by the payment of available funds at any time, provided that the alleged conduct giving rise to the personal damages claim was taken within the scope of employment, and that such settlement or compromise is in the interest of the United States." 28 C.F.R. 50.15(c)(2). This regulation empowers the Attorney General, where appropriate, to pay compensation in the small class of cases in which *Bivens* provides the sole avenue of relief.

case, where inmates can and do invoke litigation and discovery against prison officials for the purpose of "harassment and intimidation." *Cleavinger* v. *Saxner*, 474 U.S. 193, 203 (1985).

2. Completion of the grievance process by *pro se* prisoners also promotes judicial efficiency. This Court has expressed concern that "the capacity of our criminal justice system to deal fairly and fully with legitimate claims will be impaired by a burgeoning increase of frivolous prisoner complaints." *Procunier* v. *Martinez*, 416 U.S. at 405 n.9; see also *Preiser* v. *Rodriguez*, 411 U.S. at 492. Requiring exhaustion of BOP grievance procedures helps to address this concern in several important respects.

First, as already discussed, the grievance process can and does result in a reduction in the number of claims filed in federal court.[11] Second, an administrative record can be employed by the litigants and the court itself to facilitate fair and efficient handling of the claims. As the Seventh Circuit has observed, "[b]ecause the vast majority of [prisoner] cases are filed without the benefit of formal legal assistance, judges and law clerks expend substantial time and energy analyzing these *pro se* complaints, which are held to less stringent standards than formal pleadings drafted by lawyers, to determine

[11] Indeed, there is evidence that the use of state prison grievance procedures following the enactment of 42 U.S.C. 1997e, discussed *infra*, has resulted in a decrease in prisoners' Section 1983 claims. See Note, *Resolving Prisoners' Grievances Out of Court: 42 U.S.C. 1997e*, 104 Harv. L. Rev. 1309, 1312-1316 (1991) [hereinafter *Resolving Prisoners' Grievances*]. See also *Martin* v. *Catalanotto*, 895 F.2d 1040, 1042 (5th Cir. 1991) (South Carolina experienced a 33% decrease in Section 1983 suits after the adoption of an administrative remedy under Section 1997e).

whether 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Secret* v. *Brierton*, 584 F. 2d 823, 829 (7th Cir. 1978) (quoting *Haines* v. *Kerner*, 404 U.S. 519, 520-521 (1972) (per curiam)).

Although, as petitioner observes, "the inmate is not bound" by the facts "determined in the grievance process," Br. 19 n.19, the development of an administrative record may nevertheless aid the court in determining whether an otherwise deficient pleading could potentially be reformulated to state a meritorious claim. In those circumstances, the court can attempt to ensure that the inmate is afforded appropriate assistance—for example, appointment of *pro bono* counsel—in lieu of dismissing the claim under Federal Rule of Civil Procedure 12(b)(6).

In addition, the grievance procedure can improve the clarity of the inmate's complaint. If an inmate has been required to explain the nature of his complaint to prison officials, and has been afforded a corresponding opportunity to learn the factual basis for the prison's denial of his claim before filing in federal court, "his complaint * * * will be more refined and the pertinent issues will be more sharply drawn into focus." *Secret* v. *Brierton*, 584 F.2d at 829. This can, in turn, enhance the district court's ability to determine whether a prisoner has a legitimate *Bivens* action at all, since only a limited category of complaints can even state a claim for relief under *Bivens*.

Even where the administrative record does not materially aid the court with the disposition of the complaint under Rule 12(b)(6), it will still serve to aid the litigants and the court in identifying undisputed

facts so that summary judgment issues can be resolved prior to discovery. Petitioner's complaint provides an excellent example of how an administrative record would be important. In a *Bivens* action based upon allegations of inadequate medical care, a prisoner must prove "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U.S. at 106. The grievance process can provide precise information on the nature of petitioner's medical problems and treatment. Such facts will often be uncontested, and will demonstrate without need for further factfinding that the course of treatment could not support an award of damages under *Bivens* as a matter of law.

C. Congress Has Articulated A Policy Favoring Exhaustion Of Prison Grievance Procedures Prior To Filing Constitutional Claims Against Government Employees

Bush v. *Lucas*, *supra*, and *Schweiker* v. *Chilicky*, *supra*, establish that this Court will impose limits on the availability of a *Bivens* remedy where such limits are appropriate in light of relevant—but not controlling—congressional policies. As set forth in *Bush*, 462 U.S. at 373, this Court has the "power to grant relief that is not expressly authorized by statute" but "such power is to be exercised in the light of relevant policy determinations made by Congress." This rule of decision strongly supports adoption of an exhaustion limitation for *Bivens* actions brought by inmates of federal correctional facilities.

1. In response to this Court's decisions holding that exhaustion of administrative remedies is not required prior to the filing of constitutional claims against state officials under 42 U.S.C. 1983, Congress enacted 42 U.S.C. 1997e. See *Patsy* v. *Board of Regents*, 457 U.S. at 508-509. This provision permits

federal district courts to compel prisoners filing Section 1983 claims to exhaust a state prison grievance process.[12] As this Court found in *Patsy*, 457 U.S. at 508, Congress determined that it was necessary to "carve out" prisoner claims from the "no exhaustion rule" under Section 1983 in order to "improve prison conditions."

The legislative history reveals that the policy considerations that led to enactment of Section 1997e are identical to those that support the BOP regulation in this case. Congress found that exhaustion of prison grievance procedures would

> make an important contribution toward reducing court backlog in many districts. The almost 10,000 prisoner suits brought to court in 1978 are swamping our judges. Many of these complaints are pro se and often poorly drafted in terms of presenting the problem in a legal context. Requiring the exhaustion of in-prison grievances should resolve some cases thereby reducing the total number and help frame the issue in the remaining cases so as to make them ready for expeditious court consideration.

S. Rep. No. 416, 96th Cong., 1st Sess. 34 (1979). Congress also found that the presentation of complaints to prison authorities through established

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[12] Section 1997e(b)(2) of the Act sets forth minimum standards for state prison grievance procedures. The determination that a plan complies with the statutory standards is made either by the Department of Justice under regulations promulgated by the Attorney General, see 28 C.F.R. 40.1 *et seq.*, or by a district court. See also *Patsy* v. *Board of Regents*, 457 U.S. at 507-512. (discussing Section 1997e); *Resolving Prisoners' Grievances*, *supra*, 104 Harv. L. Rev. at 1312-1316.

channels would encourage greater institutional responsiveness and a higher level of prisoner satisfaction. See S. Rep. No. 416, *supra*, at 34 (state grievance procedures encourage "resolution of problems by the persons involved in prison administration. This should help to develop a sensitivity that may have been otherwise lacking."). In addition, Congress acted to help reduce the ever increasing "burden on the federal courts by diverting certain prisoner petitions back through state and local institutions and also to encourage the States to develop appropriate grievance procedures." *Patsy*, 457 U.S. at 509.

2. Petitioner contends that Section 1997e does not support the BOP position in this case because Congress conditioned the exhaustion requirement on the availability of a "plain, speedy, and effective administrative remedy," and that a remedy that does not provide for payment of money damages cannot meet this standard. Pet. Br. 14-15. But, as we have already shown, the BOP process can result in the payment of money. Moreover, state grievance procedures that do not provide monetary relief have nevertheless been considered to be "effective" within the meaning of Section 1997e where, as here, they serve the interests of the penal system, the litigants, and the courts.

In *Martin* v. *Catalanotto*, 895 F.2d 1040, 1042 (1990), the Fifth Circuit held that Section 1997e did not excuse a prisoner seeking only money damages under Section 1983 from exhausting state grievance procedures that did not expressly provide for monetary relief. As the court explained, "the reality is that underlying many prisoner suits for money damages is a complaint about prison conditions, conditions which can be remedied through the grievance procedure." Similarly, the Attorney General's regulations implementing Section 1997e require state

grievance procedures under Section 1997e to "afford a successful grievant a meaningful remedy," 28 C.F.R. 40.6, but the Department of Justice has never construed this regulation to require state grievance procedures to make provision for the award of monetary relief, and has never disapproved a state plan under Section 1997e for failure to provide for such an award.

Petitioner also maintains that it would be anomalous for federal courts to demand exhaustion of BOP procedures that omit features mandated by Congress for state systems under 42 U.S.C. 1997e—in particular, "safeguards to avoid reprisals," and "an advisory role for employees and inmates." Br. 13 n.13. Petitioner misses the mark; BOP procedures do safeguard against reprisals by permitting "sensitive" cases to be filed with the Regional Director. In adidtion, the availability of review of all decisions by BOP officials outside the particular prison itself serves to minimize the risk that reprisals will escape detection. There is thus no reason to believe that BOP procedures do not conform to these requirements in practice.

In addition, a grievance process that lacks some features that Congress chose to incorporate through Section 1997e is not necessarily ineffective or fundamentally unfair. The Federal Courts Study Committee, which was created by Congress in 1989 to study the federal court workload, concluded that systems that do not fulfill all the requirements of Section 1997e may nevertheless be "fair and effective." *Report of the Federal Courts Study Committee* 50 (1990). In explaining this conclusion, see *Federal Courts Study Comm., Working Papers and Subcommittee Reports* 395-396 (1990) (emphasis added)

(quoted in *Resolving Prisoners' Grievances, supra*, 104 Harv. L. Rev. at 1322), the subcommittee created to study Section 1997e stated:

> Prison administrative remedies work primarily for three reasons. First, they inform prison officials of problems the officials might not otherwise discover, enabling them to respond before litigation. Second, they reduce prisoner dissatisfaction by allowing prisoners to air their complaints. Third, they tend to be less adversarial, and so more effective, than litigation—which seriously disadvantages the (invariably *pro se*) inmate. *None of these advantages is peculiar to a process that incorporates the particular requirements of section 1997e(b)(2).*

3. Congress's failure to enact a provision parallel to Section 1997e for federal prisoners cannot be seen as an expression of legislative intent to permit *Bivens* claims to proceed without exhaustion. Section 1997e was adopted as part of a more comprehensive statute addressing the enforcement of civil rights statutes enacted by Congress. See *Patsy*, 457 U.S. at 508. In this context, it is hardly surprising that Congress did not draft Section 1997e to encompass exhaustion of claims against federal officers, which were not even authorized by Congress in the first instance.

Moreover, it would be inconsistent with the logic of the Court's decision in *Butz* v. *Economou*, 438 U.S. at 500-501, to infer that Congress intended to foreclose exhaustion of grievance procedures for federal prisoners, since the public policies justifying analogous procedures in the state context are equally applicable to federal claims. In *Butz*, the Court held that the "public policy" considerations governing the immunity of federal officials under *Bivens* generaliy

match those underlying the immunity afforded state officials under Section 1983, observing that "constitutional injuries" actionable under both remedies are of equal magnitude. Just as this Court saw "no sense" in developing a doctrine of immunity under *Bivens* that would "protect[] the warden of a federal prison where the warden of a state prison would be vulnerable," it similarly makes "no sense" to adopt a rule of exhaustion that would "protect[] the warden of a [state] prison where the warden of a [federal] prison would be vulnerable." 438 U.S. at 501. There is no reason to assume that Congress thought otherwise.

D. The Bureau of Prisons' Grievance Process Does Not Impair The Effectiveness Of The *Bivens* Remedy

1. In determining whether to limit its exercise of judicial power under *Bivens*, this Court has invariably given consideration to the impact its ruling will have on the litigants' ability to obtain redress for injuries of constitutional dimension. *Bush* v. *Lucas*, 462 U.S. at 386; *Carlson* v. *Green*, 446 U.S. at 22. Similarly, when the Court has been requested to condition the availability of other causes of action on exhaustion of an administrative scheme, it has also sought to determine the extent to which exhaustion would impair the litigant's judicial right of action. See, *e.g.*, *Coit Indep. Joint Venture* v. *FSLIC*, *supra*. Where requiring use of administrative processes furthers substantial governmental interests without sacrificing the litigants' rights to seek redress, such requirements have been found to be reasonable. *Ibid.*

Because exhaustion in this context advances congressional policies articulated in Section 1997e and

allows prisoners who comply with prison procedures to take full advantage of the *Bivens* remedy, it is unnecessary for this Court to undertake an independent balancing of competing interests. *Bush* v. *Lucas*, 462 U.S. at 373. If this Court were to undertake the task, it is nevertheless apparent that exhaustion is a reasonable limitation on this Court's exercise of its power to adjudicate constitutional claims, since the administrative requirement does not significantly impair prisoners' rights to seek redress under *Bivens*. The BOP proceedings are short in duration, and the inmate can obtain *de novo* adjudication of his claim at the conclusion of the process.[13] See *Coit Indep.*

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[13] Initially, petitioner argued that BOP's administrative procedure was time-consuming and that its application may result in a failure to satisfy the statute of limitations for *Bivens* actions. Pet. 13-14. This argument is untenable, since even if each fixed extension of time permitted by the grievance regulations is granted, the review process is completed in about seven months (215 days), which creates no statute of limitations problems. See, e.g., *Johnston* v. *Horne*, 875 F.2d 1415, 1424 (9th Cir. 1989) (three-year statute of limitations for *Bivens* action borrowed from Washington's residual limitations period); *Chin* v. *Bowen*, 833 F.2d 21, 22-24 (2d Cir. 1987) (applying New York's three-year limitations period for personal injury actions); *McSurely* v. *Hutchison*, 823 F.2d 1002, 1005 (6th Cir. 1987) (applying Kentucky's one-year limitations period for personal injury actions), cert. denied, 485 U.S. 934 (1988).

In this respect, this case is unlike *Coit*, *supra*, in which the Court held that an administrative claims procedure should not be enforced because it allowed the reviewing agency "to delay the administrative processing of claims indefinitely, denying a litigant its day in court, while the statute of limitations runs." In *Coit*, timely compliance with the exhaustion requirement could result in the loss of all judicial relief. Here, timely compliance with the BOP grievance procedures does not threaten to deprive the prisoner of the full measure of relief available

Joint Venture, 489 U.S. at 584-585 (procedure imposing reasonable time limits on administrative decision-making can be required without specific congressional authorization because a short delay would not unfairly prejudice the litigant.)[14]

Moreover, the purposes of the *Bivens* remedy identified in *Carlson* v. *Green*, *supra*—compensation and deterrence—are achieved regardless of whether an inmate is first required to present his claim to prison authorities. *Bivens* actions foster deterrence because the "individual official faces personal financial liability," 446 U.S. at 21. An exhaustion requirement does not eliminate that risk. The procedure in issue permits *de novo* judicial consideration, and thus does not compromise the inmate's right to full compensation for meritorious claims, including punitive damages.

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through a subsequent court action. The resulting delay is modest, and only briefly postpones a judicial determination. See *Muhammad* v. *Carlson*, 739 F.2d at 124. In any event, because the time necessary for the district court to render its decision may be reduced, the benefits of administrative consideration "mitigate[] the modest delay inherent in pursuing the grievance process." *Secret* v. *Brierton*, 584 F.2d at 829.

[14] In his brief, petitioner now argues that the "short time deadlines" for filing and appeal are unfair. Br. 8. However, those time limits benefit inmates by bringing prisoner complaints to the attention of authorities quickly, thereby encouraging the prompt resolution of complaints. Petitioner does not point to any obstacles to inmates' meeting the relevant filing deadlines, nor could he. Filing is accomplished by submission of a simple and readily available form to a prison staff member. Prisoners may receive assistance from prison staff or other inmates in preparing complaints and appeals, and extensions "shall be" granted if the inmate "demonstrates a valid reason for delay." See 28 C.F.R. 542.13; Federal Prison System Program Statement 1330.7, at 2.

In other cases, this Court has determined that it was reasonable to adopt far more stringent limitations on the *Bivens* remedy based upon similar governmental interests. See pp. 13-15, *supra*. Petitioner nevertheless contends that exhaustion cannot be reasonable here because the grievance procedure at issue does not provide expressly for monetary remedies, and the BOP's fact finding procedures lack the procedural safeguards of adjudicatory hearings. Neither concern, however, abrogates an inmate's right to recover under *Bivens*, and neither is sufficient to defeat the institutional interests fostered by exhaustion.

2. Petitioner's assertion that exhaustion is unreasonable because the grievance procedure offers him "no form of compensation for past injuries", and that he has "no chance of winning the relief" he seeks is simply not accurate. Pet. Br. 13. As previously described, the Bureau of Prisons has authority to settle inmates' tort claims, and that authority has been exercised in the course of an administrative grievance procedure. See, *Randolph-Sheppard Vendors of America* v. *Weinberger*, 795 F.2d 90, 107 (D.C. Cir. 1986) ("When determining whether a remedy will be adequate, a court must consider all potential methods at the agency's disposal to remedy a violation if one is found.").

In any event, petitioner's argument rests upon the erroneous premise that, because the BOP grievance regulations do not expressly provide for monetary relief, the process cannot be reasonable or "adequate" as a matter of law. Pet. Br. 11-12. This Court has never ruled, however, that exhaustion can only be required where the relief afforded at the administrative level serves as a complete substitute for relief subsequently available in court. Instead, the Court has examined

a range of criteria to determine whether exhaustion would advance congressional policies underlying the respective statutory schemes. See *Bowen* v. *City of New York*, 476 U.S. 467, 484 (1986) ("[A]pplication of the exhaustion doctrine is 'intensely practical,'" quoting *Mathews* v. *Eldridge*, 424 U.S. 319, 311 n.11 (1976)); *Patsy*, 457 U.S. at 502 n.4. ("In determining whether exhaustion of federal administrative remedies is required, courts generally focus on the role Congress has assigned to the relevant federal agency, and tailor the exhaustion rule to fit the particular administrative scheme created by Congress.") See also *McKart* v. *United States*, 395 U.S. at 193 (courts should apply the exhaustion doctrine with "an understanding of its purposes and of the particular administrative scheme involved."); accord *Weinberger* v. *Salfi*, 422 U.S. at 765. As these precedents indicate, exhaustion can serve a variety of institutional interests, and the litigant's interest in immediate access to complete relief is only one factor in the exhaustion calculus.

Congress has often conditioned the availability of judicial remedies on the satisfaction of administrative prerequisites that do not provide full relief to the litigant. See, *e.g.*, Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6972 (statutory requirement of 60 days' notice to the EPA as a prerequisite to the filing of a citizen's suit to enforce the statute); *Hallstrom* v. *Tillamook*, 110 S. Ct. 304 (1989) (upholding RCRA notification requirement). See also, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (requiring an aggrieved individual to file a claim of discrimination with the EEOC before filing a civil action in federal court,

even though EEOC has no power to grant back pay or reinstatement).[15]

Similarly, this Court and others have sometimes required administrative exhaustion in the service of important congressional policies where the administrative scheme could not provide the relief sought. For example, in *Renegotiation Bd.* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 20 (1974), the Court held that a contractor must comply with administrative procedures for a contract renegotiation before filing a lawsuit under the Freedom of Information Act to obtain government information relating to the contract. Despite the fact that the contractor alleged that he could not obtain the requested information through administrative channels, the Court concluded that the purposes of the renegotiation procedures would be subverted by premature judicial interference.

Similarly, in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 307 (1973), the Court ruled that an antitrust suit could not proceed until the Commodity Exchange Commission had passed on the validity of the respondent's conduct under the Commodity Exchange Act, even though the Commission was powerless to remedy antitrust violations. The Court explained that prior agency adjudication was

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[15] To be sure, EEOC may occasionally persuade a private employer to provide back pay or reinstatement to the complaining employee, thereby resulting in relief similar to that which the employee might have obtained in court. In that regard, however, the Title VII scheme is, if anything, less "adequate" than the BOP grievance process here, since EEOC can only attempt to persuade private employers to make their employees whole, but the government has the power directly to compensate prisoners for tortious conduct at the administrative level. See discussion, *infra*, at pp. 19-20.

likely to be "a material aid" in deciding the antitrust question, which turned on preliminary issues of fact and law "that should be dealt with in the first instance by those especially familiar with the customs and practices of the industry and of the unique marketplace involved in th[e] case." 409 U.S. at 305. See also *id.* at 305-306 (noting "the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern."). See also *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989) (holding that a Reservist must exhaust remedies available from the Army Board for the Corrections of Military Records, even though the Board lacked the power to compel the reinstatement the plaintiff requested).

Petitioner relies upon several cases in which this Court has refused to require exhaustion due to the "inadequacy" of the administrative remedy. The result in each of those cases, however, was not dictated by an inflexible rule of law precluding exhaustion of procedures that do not afford complete relief; rather, it was based upon the Court's determination that exhaustion was not consistent with Congress's intent under the particular statutory scheme at issue. See *Patsy*, 457 U.S. at 501-502 (noting that "legislative purpose" is "of paramount importance in the exhaustion context" because courts "should not defer the exercise of jurisdiction under a federal statute unless it is consistent with that intent").

In *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963), the Court held, as a matter of statutory construction, that 42 U.S.C. 1983 was designed to supplement existing state remedies for violations of constitutional rights that were available "in theory" but not "in practice." Thus, the Court's ruling that exhaustion of state remedies is not a prerequisite to a

Section 1983 suit arose out of its determination that such a requirement would subvert the Congressional intent behind Section 1983. Similarly, in *Honig* v. *Doe*, 484 U.S. 305, 327 (1988), the Court indicated that exhaustion of an administrative remedy would not be required where it would be futile because "we have no reason to believe that Congress meant to require [exhaustion] * * * in all cases, no matter how exigent the circumstances." Most recently, in *Coit Indep. Joint Venture*, 489 U.S. at 586-587, the Court held that the administrative claims procedure established by the Federal Bank Board "exceed[ed] [the agency's] statutory authority" because it allowed FSLIC "to delay the administrative processing of claims indefinitely * * * while the statute of limitations runs," thus potentially depriving litigants of a state law remedy that Congress did not intend to extinguish. See also *id.* at 589 (Scalia, J., concurring in part and concurring in the judgment) ("What is enough to suggest a congressional intent to defer the maturing of a federal cause of action is not enough to suggest a congressional intent to override state law."). See also *Felder* v. *Casey*, 487 U.S. 131 (1988).

These cases—in which the Court inferred that Congress did not intend "to defer the maturing of a * * * cause of action" pending exhaustion of the administrative procedures at issue—are accordingly inapposite in this case. The *Bivens* action was not created by Congress, so there is no concern that exhaustion of BOP procedures is inconsistent with congressional intent. On the contrary, the adoption of Section 1997e reveals a congressional policy supporting the application of exhaustion in this case. Under these circumstances, it is entirely appropriate for this Court to impose an exhaustion requirement

regardless of the availability of complete relief from the agency.

This Court has already determined that it can decline to exercise its jurisdiction under *Bivens* in deference to an administrative scheme that could "not provide complete relief for the plaintiff." *Bush* v. *Lucas*, 462 U.S. at 388. In *Bush*, this Court held that it would not exercise its power to provide redress to federal employees allegedly injured by adverse personnel actions in violation of their First Amendment rights because an important, but incomplete, administrative remedy was available. In this case, BOP does not seek to displace the *Bivens* remedy, but merely to delay it briefly to afford its administrative processes an opportunity to work effectively. *Bush* clearly allows this minimal accommodation to federal policy.

3. Petitioner's procedural objections (Br. 12-17) to the BOP grievance process also lack force. First, the fact that the BOP process provides for no formal fact-finding hearings does not impair claimants' rights to seek relief under *Bivens* because BOP does not seek to obtain estoppel effect for its findings. There are obvious benefits to permitting expeditious investigation and resolution, unimpeded by the need for formal proceedings on the record. More elaborate proceedings may be necessary to the proper exercise of adjudicatory functions, but not to prison administration. See *Coit Indep. Joint Venture*, 489 U.S. at 580-584 (indicating that an administrative process that lacks adjudicatory safeguards nevertheless serves important purposes in the resolution of claims).

Similarly, the fact that BOP is not required to apply particular laws or rules to its review of prisoner complaints also does not impair *Bivens* rights.

Prison officials are under an obligation to comply with the Constitution, relevant statutes, and regulations governing every aspect of prison life in reviewing and acting on prisoner complaints.[16] The responsibility for determining legal issues is ultimately vested in this Court in any event.

Finally, the process does not create an impermissible "conflict of interest" because it requires submission of the claim to the warden—a potential *Bivens* defendant. Pet. Br. 19. Although this Court acknowledged in *Coit Indep. Joint Venture*, 489 U.S. at 587, that FSLIC, as a competing creditor, may have an inherent conflict of interest with claimants, it nevertheless indicated that claimants could be required to submit their claims to FSLIC for consideration before going to court. In addition, the BOP process includes safeguards designed to ensure the fairness of the decisionmaking process.[17]

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[16] The court of appeals' statement that "administrative consideration is not to resolve constitutional issues" (see Pet. Br. 13 n.11) is accurate only insofar as the main focus of BOP's task is not to adjudicate questions of constitutionality, but, rather, to determine if corrective action should be taken in light of BOP's legal obligations. In any event, the policy considerations that justify the grievance requirement do not depend on the formal resolution of all issues that may be decided in a subsequent lawsuit.

[17] The grievance regulations remove authority from the officials whose conduct is under investigation. Para. 6(c) of Federal Prison System Program Statement 1330.7 provides that "complaints of staff misconduct should not be investigated by the staff member complained about," and the regulations allow prisoners to bypass wardens in "sensitive" cases by filing complaints with the Regional Director. See 28 C.F.R. 542.13(c).

CONCLUSION

The judgment of the court of appeals should be affirmed.[18]

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[18] This Court need not reach the question of whether petitioner's action should be dismissed with prejudice. If petitioner chooses to file an amended complaint based upon allegations that he has now exhausted his administrative remedies, or failed to exhaust for reasons that should not bar his claim, he is free to do so, because the dismissal in this case was issued without prejudice. It should be left to BOP and the lower courts on review to determine whether application of the exhaustion doctrine requires a dismissal with prejudice on the particular facts in this lawsuit or in any new *Bivens* action that petitioner might file in the future. Specifically, BOP should decide in the first instance whether any grievance petitioner might now file is timely and, if not, whether petitioner had a "valid reason" for any delay in filing or appeal. 28 C.F.R. 542.13(b), 542.15. See, *e.g.*, *Greene* v. *Meese*, 875 F.2d 639, 641 (7th Cir. 1989) (remand to BOP to decide if untimely filing is excusable).

The fact that petitioner is no longer in federal confinement does not preclude recourse to BOP grievance procedures for claims that arose while in federal custody. The regulations state that the BOP procedures apply "to all inmates confined in the Bureau of Prisons institutions," but not "to inmates confined in non-federal facilities." 28 C.F.R. 542.10. BOP does not interpret this regulation to exempt individuals no longer confined in federal facilities from filing complaints or completing appeals before filing a lawsuit based on conditions of confinement in the federal prison system. Rather, the regulation serves to make clear that the procedures are not designed to address conditions of confinement in non-federal facilities for prisoners serving time on federal charges.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN J. MCCARTHY,
Petitioner,

v.

MR. MADDIGAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents offer no persuasive reason why federal prisoners should be forced to exhaust the three-tier Bureau of Prisons (BOP) grievance process before filing *Bivens* suits that seek only compensation for past constitutional deprivations. Their suggestion that this process may lead indirectly to a monetary award is plainly incorrect. Moreover, they fare no better in their attempts to muster legal authorities and policy arguments supporting mandatory exhaustion despite the absence of a relevant remedy.

I. THE BOP GRIEVANCE PROCEDURE OFFERS NO REMEDY.

The basic flaw in respondents' argument is their inability to show that the grievance process provides any "remedy" to potential plaintiffs seeking only damages for

constitutional violations under *Bivens*. This flaw, in turn, fatally undermines their contention that requiring exhaustion will serve the public interest by resolving some disputes before they get to court in the first place.

Respondents, having previously acknowledged that "prison officials . . . are not authorized to award money damages" in the grievance process, Br. in Opp. at 7 n.4, now attempt to show otherwise.[1] They point to the regulations authorizing settlement of Federal Tort Claims Act (FTCA) claims at the administrative level and suggest that this authority may be used to provide compensation to potential *Bivens* plaintiffs. Resp. Br. at 19-20 (citing 28 C.F.R. §§ 543.30, .31). But this effort to impart some significance to the grievance process in pure damages cases is unavailing.

It is true the BOP has authority to settle FTCA claims at the administrative stage, for amounts up to $2500. 28 C.F.R. § 543.31(e), (f). It is also possible that some potential *Bivens* plaintiffs may be satisfied with relief of this magnitude and will accept FTCA administrative settlements, thus precluding subsequent *Bivens* actions.[2] In many cases, however, this cannot occur because the FTCA does not apply to constitutional claims that have no state-law analogue.[3] More fundamentally, even in cases where an FTCA settlement would be possible, there

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[1] *See also* Brief for the United States in Opposition at 4 n.3, *Brice v. Day*, 444 U.S. 1086 (1980) (No. 79-5739) (where a prisoner seeks only damages, there "appears to be little justification for compelling him to resort to an administrative remedy that is neither designed to adjudicate constitutional damages claims *nor empowered to award damages relief*") (emphasis added).

[2] *See* 28 U.S.C. § 2672 (acceptance of an FTCA administrative settlement "shall constitute a complete release of any claim . . . against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter").

[3] 28 U.S.C. § 2674; *see McAfee v. 5th Circuit Judges*, 884 F.2d 221, 223 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1141 (1990); *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034 (1987).

is no reason to believe that it would promote such an outcome to require exhaustion of the BOP grievance procedure.

This is true because administrative settlements under the FTCA almost certainly occur only when prisoners have filed claims under the entirely separate FTCA administrative procedure.[4] Respondents do not say otherwise.[5] As a legal matter, the BOP regulations plainly contemplate settlement of FTCA claims *after* they have been filed, administratively, under the FTCA.[6] In any event, as a practical matter, it is implausible to suggest that the BOP sorts through a multitude of grievance filings, identifies those that might form the basis of valid FTCA claims, and *sua sponte* offers monetary settlements to grievants before they have even sought such compensation by filing an FTCA administrative claim.

If this does not occur, then it is utterly illogical to suggest that requiring exhaustion of the informal grievance procedure by potential *Bivens* plaintiffs would promote the administrative resolution of these cases under the aegis of the FTCA. Such potential plaintiffs could only receive compensation at the administrative level—

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[4] The BOP regulations contain two separate administrative complaint procedures—the grievance process at issue here, 28 C.F.R. Part 542, and a separate FTCA administrative procedure, 28 C.F.R. §§ 543.30-.32. The former covers grievances other than "tort claims" under the FTCA. *See* Resp. Br. at 3 n.1. The latter covers only FTCA claims. The informal procedure must be invoked within a matter of days. The FTCA procedure may be invoked up to two years after an alleged tort. 28 U.S.C. § 2401(b).

[5] They say only that the BOP has entered into FTCA administrative settlements before grievances have been brought to *court*, Resp. Br. at 20.

[6] The regulations provide that the BOP "shall consider administrative claims *asserted under the Federal Tort Claims Act*." 28 C.F.R. § 543.30 (emphasis added). Moreover, the process for assessing the merits of an FTCA claim begins with the submission of the prescribed FTCA claim form to the BOP Regional Office. *Id.* § 543.31.

thereby forestalling a later *Bivens* action—if they chose to file a claim under the FTCA before proceeding to court under *Bivens*. Their decision to do so, in turn, would not in any way be affected by a requirement that they exhaust an entirely separate grievance procedure where compensation is not available.

Moreover, even assuming that a filing in the informal grievance process might, by itself, produce an FTCA administrative settlement in some peculiar circumstance, this possibility still would not provide a justification for requiring all *Bivens* plaintiffs to pass through the grievance process before going to court. Since the grievance process creates no *entitlement* to a compensatory remedy, the mere possibility that the BOP may on its own initiative offer an FTCA settlement in response to an informal grievance hardly justifies mandatory exhaustion.[7] This is especially true since any potential *Bivens* plaintiff who is inclined to accept an FTCA settlement would, even absent any *Bivens* exhaustion requirement, be likely to file an FTCA claim first.

Finally, it would be wrong, in principle, to condition the filing of a *Bivens* lawsuit on completion of an administrative process where the theory is that this may lead to an FTCA settlement. *Bivens* and the FTCA provide separate remedies—against different defendants, with different forms of relief available, and serving distinct purposes. *Carlson v. Green*, 446 U.S. 14, 20-23 (1980). Congress has expressly recognized the independent importance of *Bivens* claims by providing that they, unlike common-law claims against federal employees, are not preempted by the availability of an FTCA remedy. 28 U.S.C. § 2679(b)(2)(A). A plaintiff cannot, however,

[7] It would be particularly bizarre, based on this mere possibility, to require inmates to complete three levels of the grievance process. After all, even when prisoners are directly requesting relief under the FTCA, they are only required to file a single form at the administrative level, and then wait six months, before proceeding to court. 28 C.F.R. § 543.31.

obtain relief both under *Bivens* and under the FTCA for the same injury. *See id.* § 2672 (administrative settlement under FTCA precludes claims against employee); *id.* § 2676 (judgment in FTCA action bars suit against employee involving same subject matter).[8]

Thus, a potential plaintiff has a right to decide whether to proceed under *Bivens* or under the FTCA in a case potentially covered by both remedies. *Carlson v. Green*, *supra*. Here, however, respondents are arguing that an inmate who wants to pursue a *Bivens* claim should be forced first into an administrative process based on the speculative possibility that he may be offered an FTCA settlement. In view of the clear congressional decision to allow plaintiffs a choice between the *Bivens* and FTCA remedies, the effort to link those two remedies as a basis for mandatory exhaustion is unjustifiable.

Respondents also refer in passing to another regulation authorizing the Department of Justice to settle civil damages suits brought against its empolyees. Resp. Br. at 20 n.10 (citing 28 C.F.R. § 50.15(c)(2)). They suggest that this authority could be used, during the informal grievance process, to provide compensation to potential *Bivens* plaintiffs whose claims fall outside the scope of the FTCA. However, we are not told that this has ever been done. Nor is there any reason to think that this possibility is anything more than fanciful.

This second regulation, in all likelihood, does not even come into play until after an employee has been sued and the Government has decided to offer him representation in court.[9] In any event, it specifically provides that

[8] *See Arevalo v. Woods*, 811 F.2d 487, 489-90 (9th Cir. 1987) (applying 28 U.S.C. § 2676 to a *Bivens* claim).

[9] The section cited by respondents is part of a broader regulation authorizing representation by the Government of an individual Department employee "in civil, criminal and Congressional proceedings in which he is sued, subpoenaed or charged in his individual ca-

"[a]bsent exceptional circumstances as determined by the Attorney General or his designee, the Department will not entertain a request . . . to settle a personal damages claim *before entry of an adverse verdict, judgment or award.*" 28 C.F.R. 50.15(c)(3) (emphasis added).[10] Obviously, no such verdict or judgment can occur if a potential claim is still pending only in the grievance process.

In sum, respondents simply have not shown that requiring exhaustion of the grievance procedure can lead to an award of compensation at the administrative level and thus forestall a *Bivens* suit. *See Figueroa v. Quinlan*, 1991 U.S. App. Lexis 14141 (4th Cir. July 2, 1991) ("Administrative exhaustion should not be required in *Bivens* actions seeking only monetary relief because the available administrative remedy is inadequate.") It follows that they are also wrong in arguing that mandatory exhaustion will

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pacity." 28 C.F.R. § 50.15(a). Before receiving such representation, the employee must make a written request, *id.* § 50.15(a)(1), and there must be a departmental review to ascertain whether the employee was acting within the scope of his employment and whether providing representation would be in the interest of the United States, *id.* § 50.15(a)(2). The cited section then authorizes *the Department* to "settle or compromise a personal damages claim" against a department employee where the same criteria are met. *Id.* § 50.15(c)(2). Thus, the section seems to contemplate that settlements will occur when an employee is being represented by the Department, which, in turn, only occurs after a lawsuit has been filed.

[10] The Department's explanation of this policy was even clearer:

> The policy also allows the Department in rare cases to settle an individual capacity claim by the payment of Department funds . . . . Absent exceptional circumstances, the Department will not agree either to indemnify or settle before entry of an adverse judgment. The change in policy is thus designed to discourage the filing of lawsuits against federal employees in their individual capacity solely in order to pressure the government into settlement. In the usual case, the denial of dispositive motions or the delay in deciding them will not lead to settlement before trial and judgment.

51 Fed. Reg. 27021, 27022 (1986).

significantly reduce the number of *Bivens* filings by federal prisoners and thereby ease the burdens faced by prison officials and the courts.[11] If the Government wants to divert potential *Bivens* claims from federal court, it can create a suitable administrative alternative that offers meaningful relief. It simply has not done so.

II. THERE IS NO BASIS IN LAW OR POLICY FOR REQUIRING EXHAUSTION OF A FUTILE PROCEDURE.

Respondents have also failed to demonstrate that exhaustion should be required even despite the fact that the grievance process offers no prospect for compensatory relief. The authorities they cite do not stand for the remarkable proposition that the doctrine of "exhaustion of administrative remedies" can apply where an administrative procedure does not offer any "remedy." Moreover, the other policies that supposedly would be served here by such a requirement do not withstand scrutiny.

1. Respondents cite several statutes and decisions of this Court that purportedly support mandatory exhaustion of an administrative procedure even where it does not offer any relevant remedy. They first compare this case to the Resource Conservation and Recovery Act, 42 U.S.C. § 6972, which authorizes citizen suits to enforce the statute but requires sixty days' advance notice to the EPA, the relevant state, and the prospective defendant. They argue that notice is required even though it does not "provide

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[11] To the extent that such a rule did reduce *Bivens* filings, this phenomenon would reflect, not the award of suitable compensation at the administrative level, but the inherent risk of inadvertent forfeiture of claims created by a three-level grievance procedure, with specified filing deadlines, that must be initiated almost immediately after a constitutional tort has occurred. *See* Pet. Br. at 14-15. *See also id.* at 19-20 (arguing that prospective plaintiffs who seek only damages are unlikely to be deterred from filing either by some form of prospective change won in the grievance process or by the persuasiveness of the response they receive in that process).

full relief to the litigant." Br. at 32. The purpose of this notice, however, is (1) to allow the government to take enforcement action, "thus obviating the need for citizen suits," and (2) to give "the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 310 (1989) (quoting *Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found. Inc.*, 484 U.S. 49, 60 (1987)). Thus, far from being an empty gesture, the notice requirement serves to make possible precisely the outcome sought by the prospective plaintiff—*i.e.*, statutory compliance.[12]

For much the same reasons, respondents' analogy to Title VII is also misplaced. *See* Resp. Br. at 32-33. Individuals who would file suit under that statute must first proceed in the EEOC, in order to allow the commission the opportunity to work out voluntary compliance or to file suit itself. In so doing, it can hardly be said that they are invoking an administrative process that offers no suitable alternative "remedy."

The decisions of this Court cited by respondents are equally inapposite. First, in *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1 (1974), see Resp. Br. at 33, the Court held that government contractors whose contracts were being renegotiated under the Renegotiation Act, 50 U.S.C. app. § 1211 *et seq.* (1976) (repealed 1978), could not use a request for internal government documents under the Freedom of Information Act (FOIA) as a basis for enjoining this administrative process in midstream. It reasoned that use of FOIA in this way would be fundamentally inconsistent with the ad-

[12] Here, by contrast, there is no suggestion that pursuit of the grievance procedure could lead anyone else to pursue the compensatory relief sought by the prospective plaintiff. Nor is there realistic possibility that such pursuit will motivate the individual alleged wrongdoers to pay such compensation even before they have been sued.

ministrative scheme, which began with a stage of "pure bargaining" between the contractor and the Government—where the contractor was not entitled to see all the "cards" in the Government's hand—followed by a *de novo* court review where full discovery was available. *Id.* at 20-26. Thus, the Court did not, as respondents now suggest, require exhaustion of a meaningless procedure; it simply barred premature interference with a prescribed administrative process that provided full protection of the interests of contractors at the appropriate stage.[13]

In *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289 (1973), *see* Resp. Br. at 33-34, a commodities trader claimed that he had been denied a membership in the Chicago Mercantile Exchange in violation of the Commodity Exchange Act and the Sherman Act. The Court held that his antitrust suit should be stayed until the Commodity Exchange Commission had an opportunity to consider the legality of the disputed events under the Commodity Exchange Act. 409 U.S. at 302. It stated that there was a serious question whether that Act preempts the antitrust laws in this context, that the Commission had statutory jurisdiction to apply the Act to this dispute, and that its determination would either pretermit the antitrust immunity issue (if the plaintiff prevailed administratively) or, at minimum, greatly assist the antitrust court in deciding that issue.

In this instance, it is true that the preliminary administrative procedure mandated by the Court could not provide

[13] Respondents argue that requiring exhaustion here would allow the "administrative processes an opportunity to work effectively." Br. at 36. However, it is simply not true that allowing *Bivens* claimants to go directly to court will interfere with the appropriate functioning of the grievance process. That process is geared solely to the prospective resolution of ongoing problems. Where an inmate seeks only compensation for past injury, there is thus nothing to be decided administratively. By contrast, petitioner does not argue that the grievance process may be bypassed prior to a court filing seeking prospective equitable relief.

all of the relief sought by the plaintiff under the antitrust laws. But *Ricci* was a special case where the scope of the antitrust laws depended on a careful analysis of the nature and scope of another statutory scheme, administered by a specialized administrative agency. The Court's reluctance to decide that issue without allowing the agency to exercise its statutory mandate first does not begin to support an exhaustion requirement in this case. Here, there is no dispute about the applicability of constitutional principles to the federal prisons, and the administrative procedure at issue neither develops a formal factual record nor considers any legal issue whatever.[14]

Finally, respondents rely on *Bush v. Lucas*, 462 U.S. 367 (1983), *see* Resp. Br. at 28-29, 36, where the Court refused to authorize *Bivens* actions by federal employees claiming that their superiors had violated their First Amendment rights. This holding was based on the fact that Congress, having balanced the competing considerations, had created a comprehensive administrative scheme covering this problem, which provided substantial relief. 462 U.S. at 368. Respondents attempt to show that here Congress has enunciated a policy favoring exhaustion of the BOP grievance procedure that should also be respected by this Court in crafting the *Bivens* remedy.

This analogy to *Bush* is far-fetched, to say the least. There, Congress had occupied the field by enacting a set

[14] Respondents argue that, while the BOP does not apply legal standards in the grievance process, that process serves to develop a useful factual record. Br. at 21-23. As we note *infra*, however, *all* that the grievance process actually produces is a cursory response to inmate complaints, based on whatever *ex parte* investigation administrators choose to undertake. Moreover, the cases cited by respondents for the proposition that courts should defer to the expertise of prison administrators, Br. at 17-18, all involved determinations about the substantive scope of prisoners' constitutional rights, and thus in no way support the procedural argument that prisoners' complaints should always be presented to the BOP before any court action commences.

of comprehensive administrative remedies. Here, by contrast, Congress has played only a limited role in devising the remedies and procedures that are available when federal prisoners suffer constitutional deprivations.[15] Moreover, it has never mandated or specifically authorized the creation of the BOP grievance procedure[16]—let alone indicated a view that it should be pursued prior to *Bivens* filings.

Respondents nevertheless ask the Court to infer an applicable congressional policy from the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, which, under specified circumstances, requires exhaustion of state administrative remedies before state prisoners may file actions under 42 U.S.C. § 1983. There are two problems with this argument. First, CRIPA constitutes a specific exception to the more general congressional policy, reflected in section 1983, favoring immediate access to federal courts for those claiming that governmental officials have violated constitutional requirements. *See Patsy v. Board of Regents*, 457 U.S. 496, 508 (1982). In those areas not covered by this specific exception, the existence of CRIPA thus argues *against* judicial creation of new exhaustion requirements for those seeking to vindicate their constitutional rights. *Cf. id.* at 512.

In any event, it is clear that CRIPA itself would not require exhaustion in this kind of case if the BOP grievance procedure were adopted by a state. As noted in our main brief, Pet. Br. at 13, the Attorney General—implementing the statutory requirement that states provide a

[15] To be sure, Congress has enacted the FTCA, which covers some such cases. However, as noted above, in the 1988 amendments to the FTCA Congress expressly left *Bivens* claims untouched, even as it preempted common-law claims against individual federal employees.

[16] The sole statutory authority cited by the BOP in creating the procedure is a collection of general statutes delegating authority to operate the federal prison system. *See* 28 C.F.R. Part 542 (citing 18 U.S.C. §§ 4001, 4042, 4081-82, 5015, 5039 and 28 U.S.C. § 509).

"plain, speedy, and effective system for the resolution of grievances," 42 U.S.C. § 1997e(b)(1)—requires that state procedures "afford a successful grievant a meaningful remedy." 28 C.F.R. § 40.6.[17] Respondents now argue that this standard can be met by a state procedure that offer no form of monetary remedy. Resp. Br. at 25-26. This may be true, but it is not true that such an approved procedure would have to be exhausted under CRIPA in a pure damages case.

To the contrary, under CRIPA, if an approved state plan did not offer compensation and a state prisoner filed an action under section 1983 seeking only damages, the proper response would be for the court to decline to require exhaustion.[18] This was made clear during the development of the CRIPA regulations. During that process, one comment on the proposed regulations suggested that, in addition to requiring a "meaningful remedy," they should specifically "require the availability of monetary relief through the grievance procedure." 46 Fed. Reg. 3843, 3844 (1981). The Justice Department rejected this suggestion, reasoning that this might require new state legislation and that a grievance procedure may be generally "fair and effective" even without such a remedy. *Id.* at 3845. In so doing, however, it noted that courts had a choice about requiring exhaustion under CRIPA in particular cases, adding that "[p]resumably, where monetary relief was the sole adequate remedy and could not be obtained through a grievance procedure, *exhaustion would not be appropriate.*" *Id.* (emphasis added).[19]

[17] *See also* Pet. Br. at 13 n.13 (citing regulations requiring state procedures to provide an advisory role for inmates and safeguards against reprisals).

[18] The statute makes such a decision discretionary with the court. *See* 42 U.S.C. § 1997e(a)(1) (court should continue case for up to 90 days to allow exhaustion "if the court believes that such a requirement would be appropriate and in the interests of justice").

In sum, no authority cited by respondents comes close to supporting their argument that federal prisoners seeking compensation for constitutional violations should be forced to pass through a grievance process where they cannot obtain that compensation. Indeed, respondents' failed effort to conjure up some legal basis for their position only serves to demonstrate the universality of the principle that exhaustion of administrative remedies is not required where those remedies are plainly inadequate.

2. The policy arguments presented by respondents also provide no valid basis for ignoring that basic principle in this case. When these policy arguments are fully examined, it remains clear that it would serve no legitimate purpose to require inmates to pursue three inevitably futile levels of the grievance process in every case where their only goal is to seek damages under *Bivens*. This useless requirement, moreover, would impose substantial, unjustifiable burdens and risks on the assertion of constitutional claims.

Leaving aside policy arguments based on the false assumption that an exhaustion rule would resolve many damages claims before they get to court, respondents make two additional claims. First, they argue that an exhaustion requirement would force inmates to come to administrators first with their complaints, thus promoting an expeditious response by the persons responsible

[19] For these reasons, it is neither surprising nor relevant that the Justice Department has not rejected certification of state grievance procedures that fail to offer a monetary remedy. *See* Resp. Br. at 26. The approval of such a plan would not require exhaustion by state prisoners with claims like that of petitioner. The decision cited by respondents that holds otherwise, *see* Resp. Br. at 25 (citing *Martin v. Catalanotto*, 895 F.2d 1040, 1042 (5th Cir. 1990)), fails to take note of the views expressed by the Attorney General in promulgating the CRIPA regulations.

for managing the prison. Br. at 18. But, while it is obviously desirable to fix ongoing problems quickly, this goal does not justify use of a mandatory exhaustion requirement as a form of leverage to force all inmate complaints into the grievance process whenever there is a possibility that they may later form the basis of a *Bivens* suit.

The grievance procedure, by its terms, must be invoked almost instantly after an allegedly improper incident has occurred. If, in the immediate aftermath of an incident, an inmate believes that there is some form of prospective relief that could alleviate an ongoing problem or prevent a recurrence, his only real option will be to file a grievance, and he will likely do so.[20] In many cases, however, an inmate will have no reason to seek such relief. This will be true, for example, where a complaint involves a unique event—such as injuries incurred in an outbreak of prison violence or a medical problem that is unlikely to arise again.[21]

In such a case, the inmate has a right to pursue his only available remedy—damages—in a *Bivens* action filed at any time within the applicable statute of limitations.

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[20] An immediate court action seeking equitable relief would not be an alternative because exhaustion probably is a legitimate requirement in injunctive cases. *See* Pet. Br. at 20 n.20 (citing cases). Certainly, there can be no argument that the BOP grievance procedure is underutilized so that administrators lack knowledge about ongoing prison problems. *See Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 34 (1977) (testimony of Assistant Attorney General Drew Days) ("I am informed that the Bureau of Prisons has a procedure that is used very much by prisoners.").

[21] In other cases, an inmate may know that he will soon be released. Respondents, however, would require such an inmate not only to initiate the grievance procedure but to complete it after he leaves federal custody before filing suit. Resp. Br. at 38 n.18.

Respondents' proposed rule, however, would lead to forfeiture of that right in any case where a *pro se* inmate did not immediately decide to pursue a constitutional claim and take the action required to preserve that claim —a grievance filing. In so doing, the rule would change the real limitations period for *Bivens* claims from a minimum of one year, *see* Resp. Br. at 29 n.13, to a matter of a few days. Moreover, the rule would require the inmate to pass through three levels of a grievance process that would not, under any theory, serve the stated goal of expeditious problem-solving in a case where there is no ongoing problem to correct.[22]

Respondents' final policy argument is that pursuit of the grievance process in a pure damages case develops a factual record, which, in turn, can (1) improve the clarity of the inmate's complaint, (2) help the court determine whether a complaint may have merit, (3) lessen the need for discovery, and (4) identify uncontested facts that may form the basis of a summary judgment. Resp. Br. at 20-23. None of this makes much sense.

To begin with, it is important to understand that all that the grievance process typically produces is a series of one-page responses to an inmate complaint, based on whatever independent investigation administrators choose to undertake. There is no discovery, no hearing, and no more formal determination of the facts. Moreover, as respondents concede, Br. at 22, any facts recited by the administrators are not binding on plaintiffs. Thus, in deciding motions to dismiss, limit discovery, or grant summary judgment, a court has no basis for assuming the validity of those facts.

Instead, if facts are required to address the merits, the court is required to wait until defendants have submitted

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[22] See *Appleby-El v. Henman*, 1991 U.S. Dist. Lexis 10830 (D. Kan. July 30, 1991) (Tenth Circuit's exhaustion rule requires not only filing of grievance but completion of all administrative appeals).

their version of the facts through affidavits, sworn discovery responses, or testimony. These usual processes, in turn, can proceed just as well regardless of whether the BOP has commented on the case in a grievance process. Individual defendants in *Bivens* cases know the relevant facts and are fully capable of presenting them.

Finally, respondents may be correct that in some cases the grievance record will assist *pro se* plaintiffs by helping them draft their complaints or alerting courts to a potentially meritorious claim. But requiring exhaustion certainly cannot be justified on this basis. This speculative benefit is far outweighed by the risks inherent in a rule that would require those same unrepresented individuals to determine, within a matter of days, that they have a valid constitutional claim and take the steps necessary to avoid forfeiture of that claim.[23]

CONCLUSION

The decision below should be reversed.

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[23] Respondents argue that the short time deadlines in the BOP procedure benefit inmates and can, in any event, be easily met. Br. at 30 n.14. The fact remains, however, that inmates could only avoid forfeiture of their claims if they undertook the requisite informal efforts to resolve the problem almost immediately and filed a grievance within 15 days. In no other context that we are aware of has the vindication of constitutional rights been conditioned on meeting such extraordinary deadlines.